Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1499

J. J. ENOMOTO, et al.,
Petitioners,

vs.

THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

JAMES C. WRIGHT, et al.,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals

Petitioners, J. J. Enomoto, et al.,[1] respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered on November 18, 1974, and the order

[1]Petitioners are the defendants below, named in the complaint as follows: J. J. Enomoto, successor in interest as Director of the California Department of Corrections to Raymond K. Procunier, Warden R. M. Rees, successor in interest as Warden of the California State Prison at San Quentin, J. B. Gunn, Warden of Folsom State Prison, and W. T. Stone, Superintendent of the Correctional Training Facility at Soledad. Respondents allege that they are inmates at four California Penal Institutions.

denying rehearing, entered on March 3, 1975; and to review the underlying order of the United States District Court for the Northern District of California, entered on August 2, 1974, which gave rise to the mandamus proceedings in the Court of Appeals. These orders require petitioners to produce for adversary inspection the privileged and confidential contents of at least 1195 inmate files and specified other categories of confidential state government documents, including statements by inmate informers, incident reports, arrest records, coroner's reports, medical reports, and psychiatric reports.

The Court of Appeals' order was entered on petitioners' attempts to obtain interlocutory review of the discovery order by mandamus and by appeal. This single petition for writ of certiorari is submitted to seek review of the order of the Court of Appeals and of the underlying discovery order of the District Court.

OPINIONS BELOW

The order of the Court of Appeals dated November 18, 1974, and the order denying rehearing dated March 3, 1975, have not yet been reported. Copies of these orders are annexed as collective Exhibit A of the appendix to this petition.

The underlying discovery order of the District Court dated August 2, 1974, is annexed as collective Exhibit B. This order incorporates and includes the magistrate's finding and proposed order dated May 28, 1974, and the augmentation of magistrate's findings

dated July 23, 1974. The respondents' request for production of documents dated March 20, 1974, and referred to in the discovery order is annexed as Exhibit C.

JURISDICTION

This Court's jurisdiction is invoked under Title 28, United States Code section 1254 (1).

QUESTIONS PRESENTED

1. Whether the order of the District Court compelling discovery is erroneous and is in violation of Rule 26 (b) (1), Federal Rules of Civil Procedure, in that the District Court declined, in the face of a proper assertion of a qualified privilege, to balance the need of the state government to protect the safety and privacy of inmates, staff and private citizens against the need of respondent prisoners for disclosure of privileged and confidential state government documents.

2. Whether a single judge district court rather than a three judge district court has jurisdiction to enter a discovery order which in effect enjoins the enforcement of California Statutes and compels the petitioners to act contrary to California Statutes.

3. Whether the Fourth Amendment precludes compelling the production of confidential state government documents without a prior judicial determination that there is reasonable cause for their disclosure.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Federal Rules of Civil Procedure, Rule 26 (b) (1):

"Scope of Discovery. Unless otherwise limited by the order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things in the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

California Government Code section 6254:

"Except as provided in section 6254.7,[2] nothing in this chapter shall be construed to require disclosure of records that are: (a) Preliminary drafts, notes or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

* * *

(c) Personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

* * *

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of the Office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;"

[2]Government Code section 6254.7 exempts certain data relating to air pollution.

California Evidence Code section 1040 (b) (1):

"A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and;

Disclosure is forbidden by an Act of Congress of the United States or a statute of this state;"

California Penal Code section 11142:

"Any person authorized by law to receive a record ['criminal record sheet', or 'rap sheet'] or information obtained from a record who knowingly furnishes the record or information to a person

who is not authorized by law to receive the record or information is guilty of a misdemeanor."

STATEMENT OF THE CASE AND FACTS

A. The Nature of the Action

On August 15, 1973, a complaint for declaratory and injunctive relief was filed in the United States District Court for the Northern District of California. Respondents alleged that the action was authorized by 42 U.S.C. §1983. An amended complaint was filed on December 27, 1973. The amended complaint, which purported to represent named respondents in a civil rights class action, asserted, (1) that the classification procedures utilized by the petitioners with respect to maximum security housing violated respondents' rights to due process, and (2) that confinement in maximum security housing at San Quentin State Prison, Folsom State Prison, the Correctional Institution at Soledad, and Deuel Vocational Institution was in violation of the Eighth Amendment's proscription against cruel and unusual punishment.

The petitioners filed a notice of motion and motion to dismiss the amended complaint on February 7, 1974. On March 18, 1974, the court denied petitioners' motion to dismiss.

B. Proceedings in the District Court

On March 20, 1974, the plaintiffs filed a request for production of documents. Respondents sought for alleged discovery purposes the right to inspect and

copy virtually every document in the custody of the Department of Corrections and the four named state institutions without regard to whether the documents had any relation to the lawsuit. Included were requests to inspect and copy:

> "(1) All logs maintained in the segregated housing units . . .
>
> (2) All 'incident reports' or papers of any other type describing violent incidents, suicide attempts, nervous breakdowns, psychotic episodes, coprophilia or work stoppages occurring in a segregated housing unit at the subject prisons during 1972, 1973 and up to the date of this request.
>
> (3) All coroners' reports or other papers maintained by the CDC at the subject prisons from January 1, 1970 to the present describing all suicides and other deaths of the inmates who, at the time of their death or within 60 days thereof, were confined in the segregated housing unit in one of the subject prisons.
>
> (4) All medical and psychiatric reports during 1972, 1973, and 1974 on inmates who, on the date of said report, were confined in a segregated housing unit at one of the subject prisons.
>
> (5) All files, and papers, however denominated, maintained by the CDC (California Department of Corrections) or any subdivision or official thereof in its Sacramento offices or at any CDC institution, including, without limitation, the inmate's central file . . ." (Emphasis added).[3]

[3]The term central file includes but is not limited to all inmate classification documents, all medical records, all psychiatric and psychological records, all disciplinary records, all records of the California Adult Authority and all records pertaining to transfer of the inmate within a facility or to another facility.

On April 19, 1974, the petitioners filed a response to the request for production of the countless thousands of documents comprehended by respondents' request, advising the court that many of the documents requested by respondents were qualifiedly privileged under both California and Federal law. The qualifiedly privileged documents included incident reports and statements given by confidential informers describing violent prison gang activities including murders, narcotic traffic, extortion and criminal conspiracy. Furthermore, the same objection was made to the indiscriminate release of thousands of medical and psychiatric reports to respondent prisoners.

Respondents moved to compel total discovery and petitioners filed opposition setting forth the same objections; a hearing was held in the district court on this motion on May 13, 1974.

At this hearing the petitioners once again asserted that many of the documents sought by the respondents were entitled to at least a qualified privilege and asked the district court for an *in-camera* hearing prior to ordering any disclosure. Evidence in support of petitioners' argument against indiscriminate disclosure was presented to the district court. This evidence included confidential affidavits of inmates who had been formerly affiliated with outlaw inmate gangs. These inmates averred that they feared for their lives if the respondents were granted blanket access to all the documents sought in their request for production. This fear was based upon the belief that if respondents were allowed to discover documents which revealed information concerning rival prison gangs, the respondents would know the names of members of rival gangs, their location in each institution and other information which could be used by the gangs in their struggle with other gangs, including the names and addresses of families of rival gang members. The district court, which had previously been advised of the fact that respondents were members of rival gangs, refused to consider petitioners' offer of proof and characterized that offer as an aberration.

The district court then referred the motion for discovery to a magistrate who recommended on May 28, 1974, that plaintiffs' motion for production of documents be granted in its entirety. The magistrate also declined to conduct an *in-camera* hearing. In this regard, the magistrate stated:

> "The defendants throughout their documents filed in opposition express deep concern over the existence of prisoner terrorist groups referred to sometimes as the Mexican Mafia and Nuestra Familia. It is the defendants' position that these organized groups of prisoners control narcotic smuggling into the institutions, homosexual activities, and in fact order and carry out the killing of prisoners. The defendants express concern that plaintiffs' lawyers claim to represent prisoners who are members of these warring factions and that in some way this constitutes unethical conduct. Further, defendants express concern that ring leader prisoners presently located in segregated housing may be released as a result of this law suit.

> "While all this may be true, the magistrate finds that such facts are totally ancillary to the issues before the court in these discovery proceedings. The magistrate expresses no opinion as to the truth of any of the claims made by the defendants but only finds that the existence of terrorist gangs and killings within the institutions can play no part in the decisions now to be made by the court." Exhibit B, 6.

On June 6, 1974, the petitioners filed a request for review of the magistrate's findings and recommendations. In this request, the petitioners, again imploring the district court to conduct an *in-camera* hearing prior to ordering indiscriminate disclosure of confidential documents where petitioners had asserted a qualified privilege of nondisclosure, presented the affidavit of Raymond K. Procunier, Director of the California Department of Corrections, which is annexed hereto as Exhibit D. Director Procunier averred that unlimited access by plaintiffs and their attorneys to confidential information would cause a danger to persons; would dangerously impair the ability of the California Department of Corrections to end the power, control, violence, threats, illegal activities and influence of illicit inmate gangs; and would greatly restrict the ability of the California Department of Corrections to program for greater rehabilitation of inmates. This affidavit of the director included specific examples of dangerous situations which would occur should respondents' motion for discovery be granted in its entirety; indicated a willingness to make available to respondents much of the material sought

in their motion; and asked only for the opportunity to remove for presentation to the district court at an *in-camera* hearing documents deemed by petitioners to be highly sensitive. Once again, petitioners' request for an *in-camera* hearing was summarily rejected.

A supplemental request for review of the magistrate's findings and recommendations was filed on July 2, 1974, and on July 10, 1974, a second supplemental request for review of the magistrate's findings and recommendations was filed. The second supplemental request for review was based solely on this Court's decision in *Wolff v. McDonnell,* 418 U.S. 539 (1974).

On August 2, 1974, the district court adopted the magistrate's recommendation and ordered blanket production for inspection of all the documents sought by the respondents, including the central files of the 1195 inmates, without any *in-camera* hearing whatsoever. The district court also ordered petitioners not to talk to any inmate about the lawsuit. Moreover, the district court imposed sanctions upon the petitioners for their assertion of privilege. The only protection for petitioners' interests ordered by the district court was illusory. The district court ruled that petitioners might seek a protective order on a document by document basis with respect to copying, but not with respect to disclosure. A copy of the order of the district court is attached as Exhibit B.

Throughout the proceedings in the district court, petitioners argued that the court as a single judge district court had neither jurisdiction to hear the case

nor the jurisdiction to enter discovery orders which were contrary to state statutes and compelled state officials to act contrary to state statutes. On March 15, 1975, the Chief Judge of the Court of Appeals empaneled a three judge district court.

C. Proceedings in the Court of Appeals

On August 12, 1974 petitioners filed a notice of appeal pursuant to Federal Rules of Appellate Procedure, Rule 4 (a), citing *United States v. Nixon,* 418 U.S. 683 (1974). At the same time petitioners filed a petition for writ of mandate and/or prohibition and a motion for stay of order of production. On August 15, 1974 plaintiffs filed a response to petitioners' motion for a stay.

On September 3, 1974 petitioners filed a supplemental petition for writ of mandamus and/or prohibition. On November 18, 1974 the Ninth Circuit denied the petition without hearing. The stay had previously been vacated. A petition for rehearing, suggestion for rehearing en banc and stay was then filed with the Ninth Circuit. On March 3, 1975, the Ninth Circuit denied the petition for rehearing, rejected the suggestion for a rehearing en banc and denied the motion for stay, citing the case of *Kerr v. United States District Court,* 511 F.2d 192 (1975) certiorari granted May 27, 1975, No. 74-1023. Copies of the Ninth Circuit orders are attached. Mr. Justice Brennan stayed the order of production insofar as it required petitioners to produce documents from inmate files pending the filing of this petition and ruling on it.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

The disclosure of thousands of state prison records has been ordered. The fact that many of these documents contain highly sensitive matters is undisputed. The custodian of these records, the Director of Corrections, personally asserted at the proper time and place that these confidential records were qualifiedly privileged. He sought only an *in-camera* hearing to allow the district court to weigh his assertion of confidentiality against any assertion by respondents of their need for the documents in the litigation. Even apart from the affidavit of the director, the description of the documents sought by respondents makes their confidential content apparent, while the usefulness of the documents to the respondents is at best speculative.

Notwithstanding the repeated efforts of petitioners to obtain a preliminary review from the district court, all relief was denied. The Court of Appeals also refused to afford necessary relief by mandamus or appeal. This case thus involves a serious question of far reaching impact concerning discovery in suits initiated by prisoners under the Civil Rights Act (Title 18 U.S.C. section 1983 et seq.) against their custodians. This petition for certiorari must be granted to review not only the denial of relief in the courts below, but also to establish guidelines for discovery when confidential and privileged state government documents are at issue. That this is not an isolated incident is demonstrated by the petition for certiorari

in the case of *Kerr v. United States District Court*, No. 74-1023, granted May 27, 1975, which also seeks review of an order for the indiscriminate production of thousands of prison records.

I

THE ORDER OF THE DISTRICT COURT COMPELLING DISCOVERY IS CONTRARY TO RULE 26 (b) (1), FEDERAL RULES OF CIVIL PROCEDURE, IN THAT THE DISTRICT COURT REFUSED IN THE FACE OF A PROPER ASSERTION OF QUALIFIED PRIVILEGE TO WEIGH THE UTILITY OF THE DOCUMENTS TO THE PLAINTIFFS AGAINST THE NEED OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS TO MAINTAIN THEIR CONFIDENTIALITY

Many of the documents sought by the plaintiffs are qualifiedly privileged under California law, since it is recognized that the State has the right to maintain confidentiality of documents to preserve the security of a penal institution and the security of informants or others who might be endangered by disclosure. *In re Olson*, 37 Cal.App.3d 783 (1974), 112 Cal. Rptr. 579; see also *Procunier v. Superior Court*, 35 Cal.App.3d 207, 110 Cal. Rptr. 529 (1970); *Yarish v. Nelson*, 27 Cal.App.3d 901-902, 104 Cal. Rptr. 205, 211-212 (1972).

Under federal law, documents, the disclosure of which will jeopardize national security, individual rights or personal safety, are also qualifiedly privileged. When a civil litigant in a federal proceeding seeks discovery of a document in the face of a proper assertion of qualified privilege, the district court must

hold an *in-camera* hearing and balance the need for the document by the party seeking discovery against the reasons asserted for maintaining confidentiality. *United States v. Reynolds*, 345 U.S. 1, 11 (1953); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Company*, 431 F.2d 384 (5th Cir. 1970).

Although the director of corrections personally by affidavit asserted the privilege in the precise manner set forth by the Court in *United States v. Reynolds, supra*, at 7-8, the district court, contrary to law, refused to balance any competing interest between respondents and the petitioners. On the contrary, the district court adopted the magistrate's findings which included the express finding that it made no difference whether discovery in the instant case created a substantial risk of danger to inmates, their families and staff. Exhibit B, 6. This finding is at total variance with the views of this Court expressed in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, this Court stated as follows in ruling that an inmate does not have the constitutional right to confrontation and cross-examination in prison disciplinary proceedings:

> "We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story

privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem." *Id.* at 568-569.

These interests, deemed important enough by this Court to restrict an inmate's right to confrontation of his accusers in a prison disciplinary proceeding, were regarded by the district court as "totally ancillary" in the discovery proceedings below. Indeed, in *Wolff*, this Court permitted prison officials to make a conclusive determination against disclosure in the disciplinary setting; here petitioners request no more than that a neutrai and detached judicial officer make such determination in a discovery proceeding.

The drafters of Rule 26 (b) (1) Federal Rules of Civil Procedure recognized that discovery could be limited by a proper assertion of privilege. Petitioners respectfully submit that they properly invoked a qualified privilege. The district court was therefore required to hold an *in-camera* hearing and its failure to do so reflected a total disregard for the dangers involved in its indiscriminate discovery order.

II

A SINGLE JUDGE DISTRICT COURT HAS NO JURISDICTION TO ENTER A DISCOVERY ORDER WHICH IN EFFECT ENJOINS THE ENFORCEMENT OF CALIFORNIA STATUTES AND COMPELS THE PETITIONERS TO ACT CONTRARY TO CALIFORNIA STATUTES

California Government Code section 6254 exempts from disclosure requirements personnel, medical or similar files, the disclosure of which would constitute unwarranted invasion of personal privacy. This section also exempts from disclosure investigatory or security files compiled by California Department of Justice or any other State or local agency for correctional purposes. California Evidence Code section 1040 (b) (1) provides that a public entity has a privilege to refuse to disclose official information if the privilege is claimed by a person authorized by the public entity to do so and the disclosure is forbidden by an act of Congress of the United States or by a California law. California Penal Code section 11142 provides that any person authorized by law to receive a record such as a "criminal record sheet" or "rap sheet" or information obtained from a record who knowingly furnishes the record or information to a person not authorized by law to receive it is guilty of a misdemeanor. The discovery order of the district court is enforceable by the power of contempt, and thus tantamount to an injunction prohibiting petitioners from obeying these state laws. No cloud of unconstitutionality hovers over these provisions of state law.

Petitioners submit that the single judge district court was without jurisdiction to enter a discovery

order which as applied invalidates state statutes and compels the petitioners to act in derogation of their official duties. Title 28 U.S.C. section 2281 provides that the single judge district court is without jurisdiction to enter an interlocutory or permanent injunction restraining the enforcement of a state statute on the ground of its unconstitutionality. "The crux of the business [the requirement for a three judge court set forth in Title 28 U.S.C. section 2281] is procedural protection against improvident state-wide doom by a federal court of the state's legislative policy." *Phillips v. United States,* 312 U.S. 246, 251 (1941); *Gilmore v. Lynch,* 400 F.2d 288, 230 (9th Cir. 1968). California's legislative policy as interpreted by its courts imposes upon petitioners the duty to preserve the confidentiality of the documents at issue here. (*In re Harrell,* 2 Cal.3d 675, 691 (1970); *Procunier v. Superior Court,* 35 Cal.App.3d 207 (1973)). Surely a single federal judge can not accomplish by means of a discovery order what he could not accomplish by means of an injunction.

III

THE FOURTH AMENDMENT PRECLUDES COMPELLING THE PRODUCTION OF CONFIDENTIAL GOVERNMENT DOCUMENTS WITHOUT A PRIOR JUDICIAL DETERMINATION THAT THERE IS REASONABLE CAUSE FOR THEIR DISCLOSURE

The decision below violates the fundamental right to be free from unreasonable search and seizure. Expectations of privacy, insofar as they are reasonable, are protected by the Fourth Amendment. Compulsory

process for the production of documents may not issue in derogation of the Fourth Amendment. An order compelling the disclosure of privileged documents is not authorized by statute, and is as defective as is a search warrant issued without probable cause. An order compelling the production of confidential documents, without a prior determination that their utility in the litigation is paramount, is as objectionable as is a general search warrant.

The essence of the Fourth Amendment is the protection of reasonable expectations of privacy. When a person communicates information to government officials in confidence, he may reasonably expect that the confidence will be maintained unless a justification for disclosure is found to outweigh the justification for confidentiality. In such circumstances, the expectation is not that disclosure is inevitable (*Couch v. United States,* 409 U.S. 322, 335 [1973]), but rather that confidentiality will be asserted. Similarly, when a government official's duties include control over confidential documents, he may reasonably expect that he will not be compelled to disclose information unless the justification for disclosure is found to outweigh the reasons for confidentiality. In such circumstances, the official cannot be said to be assuming a duty to disclose the documents (*Davis v. United States,* 328 U.S. 582, 589-590 [1946]), but rather is assuming a duty to assert their confidentiality. Therefore, it is reasonable to expect that confidential documents will not be disclosed unless it is shown that the justifications for disclosure are paramount. Such an expectation is in fact protected by the Fourth Amendment.

This is true since the essence of a search and seizure is not the physical intrusion and taking of property but the element of compulsion (*Boyd v. United States,* 116 U.S. 616, 621-622 [1886]). Compulsory process for the production or inspection of documents is subject to the limitations inherent in the Fourth Amendment, and any order pursuant to Rule 37 of the Federal Rules of Civil Procedure, compelling a party to produce documents, is likewise subject to the limitations of the Fourth Amendment. By analogy, a search warrant may issue only upon probable cause. Compulsory process, whether it be in the form of a discovery order or otherwise, may issue only upon statutory or constitutional authorization. *Oklahoma Press Publishing Company v. Walling,* 327 U.S. 186, 209 (1946). Rule 26 (b) (1) of the Federal Rules of Civil Procedure goes a step further and explicitly exempts from discovery matters which are privileged. Confidential state documents are privileged as a matter of law unless there is a showing and a determination that their utility in the litigation is paramount to their confidentiality. Accordingly, a court order compelling the production of confidential documents, without a prior *in-camera* inspection and determination, is necessarily in direct violation of Rule 26 itself. Such an order is explicitly precluded by Rule 26 (b) (1) of the Federal Rules of Civil Procedure and is in effect analogous to the search warrant issued without probable cause. As such, the Fourth Amendment precludes the issuance of such an order or if the order is issued, makes it unconstitutional and without effect.

CONCLUSION

This is an important case. Petitioners respectfully request this court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review and reverse the order of discovery entered by the District Court.

Dated, May 27, 1975.

EVELLE J. YOUNGER,
Attorney General of the State of California,

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Criminal Division,

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JEROME C. UTZ,
Deputy Attorney General,

KARL S. MAYER,
Deputy Attorney General,

MICHAEL BUZZELL,
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Attorneys for Petitioners.

(Exhibits Follow)

Exhibits

Exhibit A

United States Court of Appeals
for the Ninth Circuit

No. 74-2510

Raymond K. Procunier, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Correctional Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Louis S. Nelson; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,
Petitioners,

vs.

United States District Court,
Northern District of California,
Respondent,

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson, Roberto Frias,
Real Parties in Interest.

[Filed Mar. 3, 1975]

ORDER

Before: HUFSTEDLER and WALLACE, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing as unnecessary (see *Kerr v. United States District Court*, ... F.2d ..... (9th Cir.

Jan. 17, 1975)), and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The motion for a stay is denied.

United States Court of Appeals
for the Ninth Circuit

No. 74-2510

Raymond K. Procunier, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Correctional Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Louis S. Nelson; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,
Petitioners,

vs.

United States District Court,
Northern District of California,
Respondent,

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson, Roberto Frias,
Real Parties in Interest.

[Filed Nov. 18, 1974]

ORDER

Before: HUFSTEDLER and WALLACE, Circuit Judges.

Upon due consideration, the petition for writ of mandamus filed herein on August 12, 1974 and the supplemental petitions for writ of mandamus filed September 3, 1974 are denied. The notice of appeal filed August 12, 1974 is hereby dismissed.

Exhibit B

In the United States District Court for
the Northern District of California

Civ. No. C-73-1422 SAW

James C. Wright, et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed Aug. 22, 1974]

ORDER

This Motion, on July 11, 1974, came on to be heard on defendants' Request for Review of Magistrate's Findings and Recommendations of May 28, 1974. Having heard argument by counsel on defendants' Motion:

It Is Ordered that the Magistrate's Findings and Proposed Order dated May 28, 1974, and consisting of nine pages with Annex I, and attached hereto, is affirmed.

It Is Further Ordered that the May 28, 1974, Magistrate's Findings and Proposed Order as affirmed is adopted as the Order of this Court except as modified by the succeeding two paragraphs of this Order.

It Is Further Ordered that, as to Item No. 24 of the Order requiring production of documents (Magistrate's Findings and Proposed Order, p. 9), the production of each "complete inmate central file" shall be understood to have that meaning contained in the Augmentation of Magistrate's Findings Lodged July 4, 1974, which document, consisting of two pages is attached hereto, and made part of this Order and hereby approved by this Court.

It Is Further Ordered that the Court reserves judgment on whether the defendants shall be required to pay sanctions. Leave is granted to plaintiffs to file with this Court a petition for sanctions but this Court is not disposed to grant sanctions at this time.

Dated: Aug. 3, 1974

/s/ Stanley Weigel
Judge, United States District Court

In the United States District Court for
the Northern District of California

Civ. No. C-73-1422 SAW

Jamie Gonzalo, et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed Aug. 2, 1974]

MAGISTRATE'S FINDINGS AND PROPOSED ORDER

General

On or about March 20, 1974, plaintiffs served the defendants with a request for production of documents. There are 24 separate categories contained in the request, plus a request for photographs. On April 19, 1974, defendant filed a response which in substance objected to production of just about everything plaintiffs asked for. Thereafter, on May 8, 1974, plaintiffs filed a notice of motion and motion to compel production of documents and for costs.

At the same time that the motion to compel production of documents was filed plaintiffs filed a second motion entitled "Notice of Motion and Motion for Investigation, Protective Order and Specified Discovery Procedures." Both of these motions were noticed

before Judge Weigel despite the fact that the Judge had previously entered an order referring all discovery matters to the magistrate. Plaintiffs made reference to this in their second motion pointing out that one of the remedies they were seeking was an order returning all discovery matter to Judge Weigel for hearing and decision.

Both motions were noticed for hearing before Judge Weigel on May 17, 1974. In the meantime, the first named plaintiff Jamie Gonzalo had notified his lawyers that he no longer wanted to be in the lawsuit and wanted to discharge his lawyers. Thus, counsel had to bring on a third motion that they be relieved as counsel for Jamie Gonzalo and that Jamie Gonzalo's name be stricken from the pleadings. Judge Weigel granted this last motion and after hearing some rather extensive arguments in open court concluded that the remaining two motions should be referred to the magistrate for further hearing, appropriate findings and recommendations. The magistrate calendared the matter for hearing on Wednesday, May 22, 1974.

Discussion

It is important to keep in mind the nature of this case and the relief sought in the prayer of the complaint. Plaintiffs characterize this as a class action brought by the named plaintiffs on behalf of all prisoners at San Quentin, Folsom, Soledad and Deuel who are confined against their will in segregated housing for periods in excess of 30 days or who in

the future may be confined against their will for periods in excess of 30 days. (Complaint ¶14)

The Complaint asserts that plaintiffs and many others presently housed in segregated housing were placed there without any hearing and for indefinite periods which constitutes a denial of due process in violation of the 14th Amendment. Further, plaintiffs claim that the housing units themselves are unsanitary and constitute a threat to their physical and mental wellbeing. This is equated to cruel and unusual punishment in violation of the 8th Amendment. It is largely to these constitutional issues that the lawsuit addresses itself.

Much is made of the so-called attorney-client relationship in considering access of the attorneys to their clients who are prisoners inside these various institutions. Where there is a clearcut attorney-client relationship unquestionably the lawyers should have ready access to their clients. However, since this is a class action, it is not quite so clear that all persons who are members of the class have the same attorney-client relationship as exists between the lawyers and the named plaintiffs. Moreover, all agree that there are prisoners located in segregated housing units who are there at their own request. Clearly they are not within the class envisioned by the pleadings. Such individuals might very well be helpful to the plaintiffs' case as witnesses in attempting to prove that housing conditions are unsanitary in the segregated housing units as a whole, even though they are not

parties nor members of the class. As to them, obviously there is no attorney-client relationship.

Because plaintiffs assert that a class exists, sooner or later they will bear the burden of going forward under an appropriate Rule 23 motion to persuade the court to establish the class. It is important in light of the injunctive and declaratory relief on behalf of future prisoners that such a class determination be made as soon as possible.

The defendants throughout their documents filed in opposition express deep concern over the existence of prisoner terrorist groups referred to sometimes as the Mexican Mafia and Nuestra Familia. It is the defendants' position that these organized groups of prisoners control narcotic smuggling into the institutions, homosexual activities, and in fact order and carry out the killing of prisoners. The defendants express concern that plaintiffs' lawyers claim to represent prisoners who are members of these warring factions and that in some way this constitutes unethical conduct. Further, defendants express concern that ringleader prisoners presently located in segregated housing may be released as a result of this lawsuit.

While all of this may be true, the magistrate finds that such facts are totally ancillary to the issues before the court in these discovery proceedings. The control of the prison population and its administration is a problem for the State authorities. This case deals with procedural safeguards and housing conditions which, if plaintiffs are successful, will be estab-

lished with or without terrorist gangs and unaffected by them. The magistrate expresses no opinion as to the truth of any of the claims made by the defendants but only finds that the existence of terrorist gangs and killings within the institutions can play no part in the decisions now to be made by the court.

Findings

Moving to the plaintiffs' motions which are before the court:

1. Plaintiffs seek an order directing inquiry into the facts and circumstances by which Jamie Gonzalo determined to withdraw from the lawsuit. Based on the moving papers and arguments of counsel I find that if Gonzalo's decision is traceable to any acts or conduct on the part of defendants, their agents, officers or attorneys, this would constitute contempt of court in violation of Judge Weigel's order entered March 18, 1974. If plaintiffs believe this is the case they can move the court by an appropriate motion to cite one or more of the defendants for contempt. If such a motion is filed, then discovery might justify this kind of inquiry. At the moment it too is a matter ancillary to the primary issues in this case. Therefore, I recommend that the court deny without prejudice this motion that an inqury be made.

2. With respect to the motion that the court dissolve its order of March 18, 1974, referring all discovery to the magistrate, plaintiffs' objections are based on the local discovery rules (Local Rule 121(e)) which plaintiffs claim cause delays of up to 30 days or more

when magistrates hear discovery motions and the parties are permitted to appeal back to the District Court. I find that compliance with the local rules would not cause unwarranted delays in moving the case along and I recommend that this motion be denied.

3. The plaintiff seeks an order permitting plaintiffs' counsel and attorney designees (certified law students and investigators as well as experts) to have access to all members of the class as well as prospective witnesses. The magistrate finds that this is a definable class, readily identified. It is made up of prisoners in the segregated housing units. A roster can be prepared by defendants and are asked for as Item 18 of the request for production of documents. Inmates who are in segregated housing at their own request can be marked with an asterisk and would be called only as witnesses. Until the court enters its order establishing the class and modifying discovery orders, I recommend that all inmates other than named plaintiffs be classed as witnesses. Nevertheless, they should be available to plaintiffs' attorneys on a regular schedule. Plaintiffs propose an order to regulate access to the members of the class which is attached hereto as Annex I. I recommend it be adopted as the order of the court.

Defendants urge that visiting in the prisons is a matter covered by prison regulations and Department of Corrections regulations. Defendants further assert that if those visiting regulations are to be changed it can only be done following an attack on their constitutionality before a three-judge court. The mag-

istrate finds that such administrative regulations must be by-passed in order that the lawsuit may be pursued in its discovery phase without unwarranted delay and interruption. No issue is raised by plaintiff as to whether or not such regulations are constitutional and we need not reach such an issue in this discovery motion.

4. Plaintiffs seek an order prohibiting defendants, their attorneys, agents and employees, from discussing the case with persons who have established a lawyer-client relationship with the plaintiffs' attorneys. This was discussed before Judge Weigel on March 15, 1974. The defense claims some sinister motive behind this proposal but the magistrate finds that nothing in the contemplated order precludes prison personnel from talking to any of these prisoners about matters dealing with a prisoner-custodial relationship so long as no one on the defense side of the case tries to talk to prisoners about this class action lawsuit on its merits. And with that in mind, this motion should be granted.

5. Plaintiffs next seek an order that "all discovery shall pertain to members of and issues related to the class alleged by the plaintiffs." This is simply an effort by the plaintiffs to have the matter treated as a class action pending an appropriate motion and ruling by the court determining the nature and definition of the class. As an abstract proposition it should present no problems and I recommend that this be granted.

6. Plaintiffs seek an order that they be entitled to take depositions of any five correctional officers designated by them in writing and in each case the deposition limited to no more than seven hours. Such a request in the magistrate's opinion constitutes an unnecessary procedural burden. Any correctional officer who has information dealing with issues in this lawsuit is a prospective witness and any prospective witness may have his noticed deposition taken when properly served with an appropriate summons. On the present showing I find no basis for limiting plaintiffs only to five correctional officers or to the deposition length of no more than seven hours. I recommend that this order be denied.

7. Plaintiffs request an order that documents properly produced by defendants and designated by plaintiffs to be reproduced be copied by defendants and delivered to plaintiffs within two weeks from such designation at a cost to plaintiffs not to exceed three cents a page. I believe that these documents which for the most part constitute prison files and records must be maintained at the various prison facilities and therefore, it is appropriate that defendants be called upon to make the copies. Moreover, I think it is not unreasonable to ask defendants to complete the copying within two weeks from the time that the document is identified. With respect to the court setting a price ceiling on costs of reproduction, this should be denied. Certainly defendants should not be permitted to show a profit but they are entitled to recover all of their costs for making copies whatever those costs may be and I recommend that the court enter its order accordingly.

Moving next to the motion filed by plaintiffs to compel production of documents and for costs, the magistrate finds that this case at this time should be treated as a class action. The motion seeks discovery of information that would develop evidence material to the class action issue. It is clearly relevant and it should be granted with certain limitations which I will cover in the paragraphs which follow.

The first item requested by plaintiffs is for an order directing that three *"experts"* designated by plaintiffs be permitted to inspect and photograph all segregated housing units and that two attorneys representing plaintiffs accompany the experts. It is clear that plaintiffs have alleged unsanitary, crowded, inadequately lit housing facilities, and the only way to show this to the court is by means of photographs or an inspection by the court. I have some difficulty in finding the need for *three* individuals called *"experts"* unless by expert is intended a professional photographer. As interpreted the request of plaintiff should be granted.

Moving next to the 24 categories of documents:

Item No. 1 asks for logs maintained in segregated housing units but does not fix any time limits. It would appear that this request should be granted with a date beginning January 1, 1971 up to the present time.

Items 2-16 should be granted.

Item No. 17 asks for all medical and psychiatric reports during 1972, 1973 and 1974, on inmates who,

on the date of said report, were confined in a segregated housing unit at one of the subject prisons. Any medical reports which deal with individuals who are not members of the purported class should not be released without the written consent of the individual involved. Records on class members should be made available under a suitable protective order. (See Item 24)

Item No. 18 is a request for rosters such as I discussed in paragraphs above dealing with the right of the plaintiffs to interview members of the class and prospective witnesses. Clearly this should be granted.

Items 19-23 should be granted.

Item No. 24 asks for the complete inmate central file for each inmate who is presently housed in the segregated housing units of the four named institutions. I believe the motion should be granted subject to a protective order which limits access to the attorneys for the plaintiff class and not attorney designees. Further, that the production be made at the facility where the records are kept rather than delivery to the plaintiffs' law offices and further that any particular items contained in those files which plaintiffs desire to have duplicated can, on a proper showing by the defendants, be duplicated subject to some form of confidentiality or protected right of privacy. Defendants may submit a form of protective order.

I find that plaintiffs' motion for costs in bringing both of these motions should be granted. Defendants'

motion for costs should be denied. Plaintiffs should, within 30 days following entry of the court's order, file with the court a detailed affidavit in support of their claim for costs setting forth the amount they seek and the basis on which the total is computed, together with a form of order for the court to sign awarding costs in that amount.

Dated: May 28, 1974.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
United States Magistrate

It Is So Ordered.
Dated: 8/2/74.

/s/ Weigel
United States District Judge

ANNEX 1

Proposed Amendment to Plaintiffs' Proposed Order In Gonzalo v. Procunier

It Is Further Ordered that plaintiffs' counsel and also plaintiffs' law students and investigators, and experts designated by them (herein referred to as "attorney designee") shall have free and reasonable access on Tuesday, Wednesday and Thursday, to all members of the alleged class and prospective witnesses within the California Prison System and during the hours of 8:30 A.M. to 5:00 P.M. Names of attorney designees and prisoners to be interviewed shall be required to be given by plaintiffs' counsel to defendants, in writing, at least 24 hours in advance of the visit of an attorney or his designee to a California prison. From the time of appearing at the prison entrance no such plaintiffs' counsel or attorney designee shall be required to wait more than 30 minutes to commence an interview with the first prisoner to be seen that day, and subsequent interviews with prisoners shall commence no more than 15 minutes after the termination of the previous interview. Defendants will insure that such access by plaintiffs' counsel and designees will permit confidential and free communication between the visitor and the client and in comfortable surroundings.

In the United States District Court for
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Jamie Gonzalo, et al.,
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Defendants.

[Filed Aug. 2, 1974]

AUGMENTATION OF MAGISTRATE'S FINDINGS LODGED MAY 28, 1974

On May 28, 1974, the Magistrate submitted findings and a proposed form of order concerning plaintiffs' Motion to Compel Production filed May 8, 1974. On Page 9 thereof, beginning on Line 5, there appears the following: "Item No. 24 asks for the complete *inmate central file* * * * " (italics supplied).

In an appearance before Judge Weigel on July 11, 1974, a dispute arose as to what documents comprise the inmate central file. Judge Weigel directed the parties to return to the Magistrate's Court for clarification and/or definition. The matter was noticed for oral argument on Tuesday, July 23, 1974, at 10:30 a.m. Counsel expressed their views, and the Magistrate agreed with Mr. Utz that the definition should be what the Magistrate had in mind at the time he lodged his findings.

There follows by description of what I expect the defendants to produce in compliance with the order submitted to Judge Weigel for signature.

Central Files include, but are not limited to, all materials written, printed, typed, photographed or recorded concerning the named prisoner while he is in the custody of the Department of Corrections pursuant to the sentence and judgment of the State Court. These will include all documents generated pursuant to classification; all medical records; all psychiatric records, to include test results of psychological testing administered; all disciplinary records; all records dealing with appearance before the Adult Authority when defendant becomes eligible for consideration for parole or determination of fixed sentence by the Adult Authority; all records of board proceedings where prisoner was the subject; all records of transfer from one facility to another within the state prison system, from one custodial status to another within a single facility, or from one facility to another.

As can be seen from the foregoing description, it is the Magistrate's understanding that the central file constitutes the repository for all records on a given prisoner, regardless of source or purpose.

Dated: July 23, 1974.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
U. S. Magistrate

Exhibit C

(Names and addresses of attorneys omitted)

In the United States District Court for
the Northern District of California

Civ. No. C-73-1422 SAW

Jamie Gonzalo, et al.,
Plaintiffs,

vs.

Raymond K. Procunier, et al.,
Defendants.

REQUEST FOR PRODUCTION OF DOCUMENTS

I. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby request that three experts designated by plaintiffs be permitted to inspect and photograph all segregated housing units at the California State Prisons at San Quentin and Folsom, the California Training Facility (Soledad), and the Deuel Vocational Institution (DVI), including, without limitation, B-Section, the North Segregation Unit and the Adjustment Center at San Quentin; the Security Housing Unit at Folsom; O-Wing, X-Wing and Y-Wing at Soledad; and K-Wing, L-Wing, East Hall and West Hall at DVI. Said inspection and photographing is to be permitted on six hours' notice to counsel for defendants on any weekday between the

hours of 9 a.m. and 5 p.m. during the period from April 15, 1974 to July 30, 1974, and two attorneys representing plaintiffs shall be permitted to accompany the aforesaid experts.

II. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby further request that defendants collectively produce for inspection and copying on May 1-5, 1974, at the State Building, 350 Golden Gate Avenue, San Francisco, California, each of the documents hereinafter specifically set forth.

Where lists, files, computer information, memos, documents, logs, reports, studies—official and unofficial, or papers of any form or kind however denominated (sometimes collectively herein referred to as "papers") are referred to, the papers called for are not only those in the possession or subject to the control of defendants, but all papers, not privileged, in the possession, custody, or subject to the control or order of defendants' staff, employees, assistants, attorneys, statisticians, accountants, auditors, consultants and subsidiary boards and commissions. If such papers are known to defendants, or any of them, to be in existence but defendants, or any of them, are for any reason unable or unwilling to make them available, please so state, including the specific reason. For each of such papers for which a claim of privilege or confidentiality is made, the paper(s) for which such a claim is made should be described in detail, including the title, date, location and custodian of such paper(s) and the precise claim of privilege or confidentiality shall be made in the response hereto.

1. All logs maintained in the segregated housing units at the California State Prisons at San Quentin and Folsom, the California Training Facility (Soledad), and the Deuel Vocational Institution (DVI) (said four prisons are thereinafter collectively referred to as "the subject prisons"), including, without limitation, all isolation and segregation logs.

2. All CDC 114 and 114a forms made out on inmates at the subject prisons during 1972, 1973, and up to the date of this request.

3. All "incident reports" or papers of any other type describing violent incidents, suicide attempts, nervous breakdowns, psychotic episodes, coprophilia or work stoppages occurring in a segregated housing unit at the subject prisons during 1972, 1973 and up to the date of this request.

4. All reports and papers concerning the use of mace, lachrymating powder or other chemical agents commonly referred to as "tear gas" in a segregated housing unit at the subject prisons during 1972, 1973 and up to the date hereof including, but not limited to all sales documents or receipts concerning the purchase of such chemical agents.

5. All monographs, studies, reports or other papers, whether published or unpublished, by CDC staff or consultants or committees or commissions designated by the CDC or the Board of Corrections concerning the use of or conditions in segregated housing units at the subject prisons or at any other prison facility administered by the CDC, including, without limitation, the "Correctional System Study" published by the Board of Corrections in July, 1971.

6. Copies of all testimony or written statements of officials or employees of the CDC or Board of Corrections submitted to state or federal governmental agencies in 1971, 1972, 1973 and 1974 concerning proposed legislation.

7. All coroners reports or other papers maintained by the CDC or the subject prisons from January 1, 1970 to the present describing all suicides and other deaths of inmates who, at the time of their death or within 60 days thereof, were confined in a segregated housing unit at one of the subject prisons.

8. All directives, memoranda, policy statements or other papers issued by defendant Procunier, CDC staff in Sacramento or defendants Stone, Gunn, Patterson and Nelson concerning establishment or implementation of the policy of confining inmates in segregated housing units under "Director's Designation."

9. All lists or other papers identifying by name and number inmates who are now or during the past 36 months were confined in segregated housing units at the subject prisons by "designation" of defendant Procunier (i.e., inmates on the so-called "Director's caseload") indicating the particular segregated housing unit at which each inmate is or was confined.

10. All papers concerning complaints about CDC staff members assigned to segregated housing units at the subject prisons, from whomever submitted, from January 1, 1971 to the date of this request, including without limitation all related investigations, reprimands, and punishments imposed as a result thereof.

11. All papers received by defendants and their agents from January 1, 1971 through the date of this request, which contain or pertain to complaints from inmates concerning conditions in segregated housing units at the subject prisons, including without limitation all so-called demands or petitions, whether or not related to a hunger strike or work stoppage or any threat thereof.

12. All administrative appeals submitted in writing to defendants and their agents from January 1, 1971 through the date of this request from any inmate who at the time of said appeal was confined in a segregated housing unit at the subject prisons.

13. All criticism of or suggestions for change with respect to conditions in the segregated housing units at the subject prisons which have been reduced to writing and received by defendants from any employee of the CDC from January 1, 1971 through the date of this request.

14. All documents and other papers which show, on a daily basis for the past 3 years, for each segregated housing unit in each of the subject prisons, whether or not a visit was in fact made to said units by a (i) licensed physician and/or (ii) paramedical employee, including without limitation, the identity of the physician or employee and the length of the visit.

15. All memoranda, directives and other papers concerning the use by correctional officers of fire arms to quell disturbances in segregated housing units at the subject prisons, or the exercise yards thereof, including, but not limited to,

manufacturers' descriptions of the fire arms and ammunition used for such purposes, and all incident reports on such usage since January 1, 1972.

16. All photographs taken by CDC personnel or their agents, including counsel for defendants herein, of inmates of segregated housing units at the subject prisons, or the premises thereof, since January 1, 1971.

17. All medical and psychiatric reports during 1972, 1973 and 1974 on inmates who, on the date of said report, were confined in a segregated housing unit at one of the subject prisons.

18. All lists, reports, documents and other papers containing the names and numbers of all inmates who, on the date of this request, were confined in a segregated housing unit in the subject prisons; the particular segregated housing unit in which each such inmate was then confined; whether the segregation of each such inmate was for "medical," "psychiatric," "disciplinary," or "administrative" reasons (as those terms are used in Director's Rule DP-4601); and the number of both consecutive and non-consecutive days each such inmate had served in said segregated confinement on the date of this request.

19. All memoranda, reports or other papers given by CDC personnel at the subject prisons or the CDC office in Sacramento or their agents to the California Adult Authority or members or representatives thereof since January 1, 1971, concerning inmates who, at the time such memoranda, reports or other papers were given, were confined in segregated housing units at said prisons.

20. All memoranda, reports or other papers given by members, representatives or agents of the California Adult Authority to CDC personnel at the subject prisons or the CDC office in Sacramento, or their agents, since January 1, 1971, concerning inmates who, at the time such memoranda, reports or other papers were given, were confined in segregated housing units at said prisons.

21. All press releases or other papers issued to the print or broadcast media by the CDC or by CDC officials, including officials assigned to the subject prisons, since January 1, 1971; and all tape recordings and transcripts of interviews during said years between CDC officials and representatives of the print and broadcast media.

22. All reports on other papers maintained by the CDC (or any sub-division or officials thereof) concerning control of rodents, vermin or infestation of other pests in segregated housing units at said prisons since January 1, 1971, including, without limitation, all sales documents or receipts concerning the purchase of materials to control rodents, vermin or other pests.

23. All documents, reports, files or other papers maintained by medical personnel at the subject prisons concerning the type, quantity and use of tranquilizing drugs (such as, for example, valium and thorazine) dispensed to inmates confined in segregated housing units at each of the subject prisons since January 1, 1971.

24. All files, and papers, however denominated, maintained by the CDC or any sub-division or official thereof in its Sacramento offices or at any

CDC institution, including, without limitation, the inmate central file, which relate to inmates who, on the date of this request, were confined in B-Section at San Quentin, the Security Housing Unit at Folsom, K-Wing at DVI and O-Wing at Soledad. The files and all other official and unofficial papers whatsoever concerning said inmates are to be produced in their entirety, as they existed on the date of this request, together with (i) all miscellaneous matter previously removed therefrom but which, on said date, was still in the possession, custody or control of defendants, or any of them, or their agents or employees, and (ii) all items inserted therein from said date through the actual date of inspection. (If, in the ordinary course, material contained in any of these files, on the date of this request, would be removed prior to the actual date of inspection, it is nevertheless to be retained separately and produced by defendants on said date.) No document or portion of any such file is to be withheld for any reason, including without limitation any "security" classification which may have been assigned to it.

With respect to any and all of the foregoing documents, reference is made to said documents as they existed on the date of this request, together with all additions thereto between said date and the actual date of inspection by attorneys for plaintiffs. In other words, no such documents are to be withheld from said inspection, even though they might in the ordinary course be discarded or destroyed by defendants prior to the inspection date.

Inspection and copying shall continue from day to day until attorneys for plaintiffs have completed their review of the files and papers hereinabove described.

Dated: March 20, 1974.

Respectfully submitted,
J. Anthony Kline
Sidney M. Wolinsky
Charles R. Lawrence, III
Fred J. Hiestand
Vilma S. Martinez
Sanford J. Rosen
William Bennett Turner
James F. Smith
B. E. Bergesen, III
Bernard Zimmerman

By /s/ J. Anthony Kline
J. Anthony Kline
Attorneys for Plaintiffs

Exhibit D

AFFIDAVIT OF RAYMOND K. PROCUNIER

Raymond K. Procunier, being first duly sworn, hereby states under penalty of perjury as follows:

He is Director of Corrections for the State of California and has occupied that position since May 1967; before being appointed to his present position he had extensive experience in all levels of prison administration; he is well acquainted with the problems of institutional administration and with the violent behavior of organized prison gangs. Based upon his experience and knowledge, it is his opinion that:

1. These gangs are made up of inmates who group together in order to accomplish various objectives, including extortion of favors from non-members and gaining control of illicit inmate activities such as drug and narcotic traffic;

2. These gangs engage in assassination of rival gang members, of informants, and of gang members who refuse to carry out assignments by gang leaders or who wish to leave the gang;

3. An attempt to identify and separate gang members in rival factions has reduced gang violence somewhat; however, it is not completely effective;

4. Separation of gang leaders from other members is another means to attempt to reduce the strength of these organizations; but it is essential that the separation include prevention of communication between leaders and followers;

5. Protection of inmates who wish to withdraw from gang activity or to cooperate in ending gang violence is crucial to removing the danger and influence of those gangs and to controlling and identifying their activity and membership;

6. The gangs also exert an influence which extends beyond any single institution and into non-institutional settings;

7. These gangs also present a threat to staff of the Department when they attempt to gain influence or demonstrate power by assaults upon staff members;

8. The violence and organized activities of these gangs pose an immediate threat to other prisoners, to the operation of the correctional system in a humane, productive manner, and to staff members;

9. The increase in gang membership and violence has created an emergency situation, and required major changes in Department policies and practices;

10. In order to effectively separate the gangs and impair or prevent communication of organizational decisions, orders, information, and instructions, to protect those inmates who wish to assist in ending the power, influence and dangers of the gangs and their destructive activities, to reduce the threats and assaults on staff of the Department, to preclude or reduce the conveyance of instructions for illegal acts beyond the prison walls, and to enable the Department to engage in wider programming for rehabilitation as well as public protection, it is essential that the Department retain its ability to make records of its activities, transfer inmates, change custodial status

and programs, and impose restrictions upon communication between inmates while at the same time retaining a degree of confidentiality about its actions. If all records pertaining to gang members or leaders are made available to other, rival gangs or to the membership in the same gang in other institutions, other areas of the same institution, or in a non-institutional setting, the information conveyed would reveal who was assisting in controlling the gangs, their location, their activities, and how they might best be retaliated against. The information could also serve to identify rival memberships and strength. It would severely endanger the ability of the Department to safely protect dissident members, as well as members of rival factions. It would dangerously impair the ability of the Department to end the power, control, violence, threats, illegal activities and influence of these gangs;

11. If this information on the location, group affiliation, and activity of members and leaders of gangs is provided on a blanket basis to attorneys or investigators, they may lack the necessary experience and training to interpret and evaluate it to determine what is and what is not harmful or important. They may inadvertently or unintentionally convey the information which is harmful, whether aware of their action or not. They may find the conflict between the gangs and the restricted communication of the known leaders creates interests which are at odds with each other in respects which affect the method of legal presentation of the various aspects of their client's cases. For example, the records or information supplied by one client orally may indicate he is a protective cus-

tody case attempting to withdraw from gang affiliation and the records or oral information supplied by another client may show he is going to utilize the first client to assassinate a third leader who is a leader in a rival gang but who has not yet been placed into more secure housing. If the attorney abandons the protective custody case as not presenting a classification problem since he voluntarily requested more secure housing, the second client will immediately be aware of the defection from the gang's ranks. If the attorney informs prison officials of the second client's intentions, he may break a confidence. If the third person is placed in more secure housing, the attorney may find he is representing the intended victim of another client who is attempting to contract the death with an unwilling assassin who is also his client. Under these circumstances, revelation of information will be against the interest of some client even though it may benefit another. Further, to attack the classification of the intended victim would in effect urge removal of that protection;

12. Based upon my experience and factors such as the foregoing, it is my opinion that attorneys should not represent clients who are members of rival factions and that access to files on inmates should be carefully restricted, as should any personal contact;

13. At the same time, I have no desire to preclude legitimate activities, nor to unduly hamper anyone's ability to question the conditions of their confinement in the courts. Such channels of protest are welcomed because they provide an outlet through socially ac-

ceptable, legal, means of protest and because they serve as another means for auditing department procedures;

14. Therefore, it is my opinion that the disruption of institutional activity, danger to persons and institutional security, and other potential harm likely to result from unlimited attorney and investigator access to confidential information is sufficiently serious that it justifies restricting attorney and investigator access. In view of the inmate's right to present his legal grievances to the courts and our policies on such court actions, some less onerous means than a total refusal to permit interviews or examination of information within the files is desirable to the department, and for this reason we instructed our attorneys today not to seek to preclude such interviews or examination on an absolute basis;

15. As a reasonable minimum set of protections, the following should not be exceeded:

(a) Attorneys should be required to obtain written consent from the inmate whose file they wish to examine or who they wish to interview, and such consent should be informed consent in that the attorney should be required to disclose in writing who his other clients are, why he seeks the information, the issues in the case, and the fact he may represent rival factions and may make the information obtained public.

(b) The inmate should be informed in writing that he need not become a plaintiff if he does not wish to do so, and that he need not talk to the attorney or investigator nor consent to a review of his file.

(c) The department should be given the opportunity to review each file and identify confidential materials of two classes with attorneys or investigators precluded from revealing the contents of one class and precluded from viewing materials which are both confidential and if revealed, dangerous to the physical well being or psychological health of any person. Items in the latter class would be removed from the file and made available to our attorneys to present to the court for in camera hearing upon request by plaintiff's counsel.

(d) Interviews consented to by inmates should be conducted during normal working hours on a mutually acceptable schedule, with due regard for the rehabilitation programming and duties of the inmate, the staffing requirements and physical plant of the institution, and the travel and time requirements of the attorneys or investigators. Except for these plaintiffs, the numbers of interviews should be restricted to one, unless there was a change in the prospective inmate witness's housing. The named plaintiffs would enjoy the normal frequency and time of interviews that any other inmate in like circumstances would since they would have a clearly established attorney-client relationship to which they would be on record as having given their consent.

The above restrictions, under present conditions, would appear to afford some degree of protection and only minor inconvenience for plaintiff's counsel. Any less restrictive situation would have a very high probability of harm to persons, of encouraging gang activ-

ity, and of threatening institutional security and the orderly administration of the correctional system;

16. While this statement is phrased in largely predictive language, the consequences of not preventing violence have been made altogether clear by the enormous number of killings within the past three years. The present situation within California's prisons and the gravity of the consequences of improper evaluation of that situation in my opinion compel at least the cautions mentioned in 15 above. While even these have a higher degree of danger than I would voluntarily accept, if current department rules, policies, or procedures are to be set aside the limitations of 15 above are provided for the court as my evaluation of the outer limits of safety.

Executed on June 6, 1974, at Sacramento, California.

/s/ Raymond K. Procunier
Raymond K. Procunier

Subscribed and sworn to before me
this 6th day of June, 1974.

(Seal) Anne Lowe

Notary Public in and for said
County and State

My Commission Expires Feb. 9, 1978

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1499

J. J. ENOMOTO, et al.,
Petitioners,
vs.
THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA,
Respondent,
JAMES C. WRIGHT, et al.,
Real Parties in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under Rule 26(b)(1), Federal Rules of Civil Procedure, in compelling production of documents relevant to the disposition of the case when:

a. The Magistrate did undertake an in camera inspection of all sealed documents lodged with the District Court by petitioners and found defendants-petitioners' claims totally ancillary to the discovery proceedings,

b. A claim of privilege was never formally made nor accompanied by any showing of privilege, and

c. The privilege informally claimed was based on state law and not binding on the District Court in a federal question case?

2. Does a single District Judge, sitting in a federal question case, lack the authority to issue a discovery order which is claimed to be contrary to state discovery statutes?

3. Does a discovery order of a District Court violate the Fourth Amendment when it compels the discovery of state documents

alleged to be privileged under state law but important to the disposition of the pending action?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND NOT SET OUT IN PETITIONERS' BRIEF

United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and usual punishments inflicted."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C., Section 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42:

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal

rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. Section 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under

section 2284 of this title."

Federal Rules of Civil Procedure, Rule 34:

"(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the

request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category with reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after

service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The amended complaint filed in the District Court on December 27, 1973, (respondents' Exhibit A) contains two independent causes of action. First, that the procedures currently being used to "administratively" segregate prisoners in isolation units violate the due process clause of the Fourteenth Amendment (Complaint, ¶60);

and, second, that the totality of physical and psychological conditions in such segregated housing units constitutes cruel and unusual punishment in violation of the Eighth Amendment (Complaint, ¶61). The discovery now disputed by petitioners relates almost entirely to this second cause of action which, unlike the first cause of action, essentially presents issues of fact rather than of law.

On February 6, 1974, defendants-petitioners moved to dismiss the complaint for failure to state a valid claim. This motion was denied by the District Court on March 14, 1974.

Thereafter, on March 20, 1974, plaintiffs-respondents[1/] filed an 8-page request for production of documents under Rule 34, F.R. Civ.P. (a copy of which is annexed to the

1/ As used herein, "respondents" refers only to those respondents who are also real parties in interest. See Rule 21(b), F.R. App. P.

Petition as Exhibit C, p. 20), seeking 24 itemized types of documents. Thereafter, petitioners filed a 3-page response essentially refusing to produce anything.

On March 5, 1974, respondents filed their Motion to Compel Production of Documents and a 43-page Memorandum of Points and Authorities in support thereof. The first hearing on the motion, which was held before District Judge Stanley A. Weigel on May 17, 1974, lasted almost an entire day. As a result of that hearing, the Judge referred the matter to U.S. Magistrate Owen E. Woodruff, Jr., for further hearings. The Magistrate held a full-day hearing on May 22, 1974, and inspected in camera all the sealed documents the petitioners had submitted to the District Court. Thereafter, on May 28, Magistrate Woodruff issued his Findings and Proposed Order granting most but not all of the discovery sought by respondents. The Magistrate recommended that a protective

order be issued limiting the access of respondents to the central files of plaintiffs-inmates and that respondents be awarded costs for their discovery motions.

On July 11, 1974, after petitioners sought review by the District Court of the Magistrate's Findings and Proposed Order, Judge Weigel held a third all-day hearing. Because of a dispute that arose at that hearing as to the meaning of the term "inmate central file", the Judge ordered the parties to return to the Magistrate for an additional hearing, which was held on July 23, 1974. At the conclusion of that hearing the Magistrate prepared a two-page "Augmentation" of his Findings of May 28. (A copy of said Augmentation is annexed to the Petition as part of Exhibit B.)

On August 2, 1974, after the resolution of all factual issues to the satisfaction of both the Magistrate and the District Judge, the latter issued an order affirming

the Magistrate's Findings and Proposed Order dated May 28, 1974, with only slight modifications. (The Judge, for example, reserved judgment on whether respondents should be awarded costs.) (A copy of the Court's Order of August 2 is annexed to the Petition as Exhibit B.)

On August 12, 1974, petitioners filed a notice of appeal pursuant to Federal Rules of Appellate Procedure, Rule 4(a), 28 U.S.C., a petition for Writ of Mandate and/or Prohibition, and a motion for a stay of the order of production. On August 15, 1974, respondents filed a response to petitioners' motion for a stay. On September 3, 1974, petitioners filed a supplemental petition for Writ of Mandate and/or Prohibition. On November 18, 1974, the Court of Appeals for the Ninth Circuit denied the petition without a hearing and on March 3, 1974, denied a petition for rehearing, rehearing en banc, and for a stay. Mr. Justice Brennan stayed

the order of production insofar as it required petitioners to produce documents from inmate files pending the filing by petitioners of a petition for Writ of Certiorari and the ruling on it.

SUMMARY OF ARGUMENT

This Court should not grant petitioners' request for Writ of Certiorari for the following reasons:

1. The issues of the petition may well be made moot because there is a motion by respondents pending before a three-judge panel of the District Court for the Northern District of California asking that court to ratify the order of the District Court which is the subject of this petition. Petitioners in their answer to that motion have raised all of the issues raised in their petition for Writ of Certiorari, and thus all the issues of their petition are now before the three-judge panel. If the panel rules on the motion before these

issues are decided by this Court, these issues will be made moot. (The defendants-petitioners' Memorandum in Opposition to the Plaintiffs' Motion for an order ratifying the order of the District Court is printed as Respondents' Exhibit B.)

2. There are substantial factual disputes on the issues that are raised in petitioners' version of the facts of this case. Petitioners argue that they are entitled to have disputed documents inspected in camera by the District Court and to have a factual decision based on a balancing of all the factors involved. In fact, not only did the Magistrate hold an in camera hearing but also the issues were argued in two full hearings before the District Court and two full hearings before the Magistrate. Petitioners in their brief neglect to mention this in camera inspection at all. In addition, the decisions of the District Court and Magistrate were based on a factual

determination of the merits of discovery in this case. Petitioners are asking this Court to "second guess" these factual decisions.

3. The District Court, in ordering discovery, did not violate its discretion. Only after the extensive hearings described above did the District Court order that the documents be made available to respondents. In addition, the Court took into account the interests of the petitioners by issuing, on the Magistrate's recommendation, a protective order which limited the access of respondents' counsel to the central files of respondents-inmates (Petitioners' Exhibit B, p. 15). Petitioners did not formally claim a specific privilege for any of the disputed documents, did not specify which specific documents were claimed to be privileged, and did not make any showing to support their blanket claim of privilege. The Magistrate found the

petitioners' claim to be so without merit that he recommended that respondents be awarded costs for bringing the motions for discovery. (The District Court reserved judgment on this issue.) Furthermore, the state statutes that petitioners claim support their arguments of privilege do not provide any privilege for judicial proceedings. More importantly, the District Court was not wrong in holding state disclosure statutes inapplicable, since that holding is supported without exception by authorities on federal law.

4. The issues in the petition do not raise important questions of law. This is an interlocutory appeal, ancillary to the merits of the case, and about an issue on which federal law is quite clear.

5. The claim of petitioners is a trivial one. This dispute primarily centers on access to the central files of inmates; and these files are in no sense confidential.

They are currently available to almost any employee of the Department of Corrections, including prison guards. Furthermore, a recent California case has held that inmates are entitled to access to most of the materials in their central files. In re Olson, 37 Cal.App. 3d 783, 112 Cal. Rptr. 579 (1974); and this decision has been implemented by the Department of Corrections. Thus petitioners' claims that the central files are confidential and that their access to respondents would wreak havoc on the California prison system are totally without basis in fact.

6. The constitutional claims petitioners raise in their brief have no support from any authority and appear frivolous. They cite no authority for their novel claim that, in federal question litigation, the decision of a federal court to follow federal rather than state discovery law is, in effect, an injunction of the enforcement

of state law and thus beyond the power of a single district judge. Likewise, petitioners' claim that the discovery order violates the Fourth Amendment flies in the teeth of the decisions of this Court and can find no support in any authority whatsoever.

7. The complaint in this case was filed on August 15, 1973. Now, almost two years later, pre-trial discovery has not even begun, largely because of the so far successful efforts of petitioners to stall this litigation in any way they can. Meanwhile, respondents continue to suffer arbitrary and capricious treatment at the hands of petitioners and are forced to live in wretched, inhuman conditions which they believe - and are prepared to prove at trial - are violations of their rights under the Eighth and Fourteenth Amendments to the Constitution. Public policy clearly indicates that, when constitutional rights

are in question, the issues should be tried and decided as soon as possible.

8. The documents which are the subject of this petition are essential to the proving of respondents' case. Failure to order discovery will deprive respondents of the opportunity to litigate their claims on the merits.

I

PETITIONERS HAVE MISSTATED THE FACTS, AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN COMPELLING THE PRODUCTION OF DOCUMENTS NECESSARY TO THE DISPOSITION OF THE CASE

A

Petitioners' first argument in their brief in support of their petition for Writ of Certiorari is based on the contention that the District Court refused "to balance any competing interest" between the parties to this suit. Such a contention is a gross factual misstatement of the procedures the District Court followed in this case. The claims of the petitioners were fully argued

and considered by the District Court. Indeed, the Magistrate not only dealt with the issues raised by petitioners at great length in open court, as did the District Judge in two lengthy hearings, but he also discussed them in his Findings and Proposed Order of May 28, 1974 (Petitioners' Exhibit B, p. 6).

Furthermore, the Court ordered that the documents inspected in camera by the Magistrate be shown to two of respondents' counsel under an appropriate protective order to insure that, as officers of the Court, said attorneys would not reproduce or divulge the contents thereof. Upon examining the documents, however, respondents' counsel were surprised to discover that they had earlier seen most of the sealed material alleged to contain "top secret" information, since this material had two months earlier been released to the public by the Senate Subcommittee on Civil Disorder, Chaired by State Senator Dennis E. Carpenter.

That is, the Report of that Subcommittee, entitled Gang Violence in Penal Institutions (March 15, 1974), is in substance virtually identical to the sealed documents presented to the District Court by petitioners, except that the actual names of certain inmates are deleted from the Legislative Report. This information was thus hardly "confidential", and the dramatic gesture of lodging them with the Court in sealed envelopes was a bit excessive.

Both the Magistrate and the Judge devoted an extraordinary amount of time at four separate hearings to all of the materials submitted and arguments raised by petitioners' in opposition to production. For petitioners now to assert, without any documentation or reference to the record, that these two judicial officers "deliberately refused" to balance the competing interests borders on the absurd.

B

The petitioners have not properly claimed a privilege nor have they made the required showing that the document or documents involved come within the reach of any privilege claimed to be invoked. Because they have done neither of these things, this is a particularly inappropriate case for plenary review by this Court. It is well settled that in order to invoke an applicable privilege "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer", United States v. Reynolds, 345 U.S. 1, 7-8 (1953). In the present case, there has been no formal claim of privilege but only the affidavit of defendant Procunier (Petitioners' Exhibit D, p. 29), which consists primarily of innuendo and opinion concerning the activity of alleged prison gangs

and does not specifically claim privilege for any specific document or documents. In addition, even the limitations on discovery in Reynolds arguably should not apply to this situation: Reynolds involved issues of national security. In that area, this Court has been most reluctant to interfere with decisions of the executive departments of the federal government. In United States v. Nixon, 418 U.S. 683 (1974), this Court stated that it would not give as high a degree of deference to the President's generalized interest in confidentiality as it did to interests of national security in Reynolds. Clearly, in this case, petitioners should be required at a minimum to conform to the procedures in Reynolds.

Petitioners did not even attempt, in the District Court or in the Court of Appeals, to carry their burden of showing that any of the documents requested by respondents

came within any recognized privilege.[2/] Instead, what the District Court had before it was no more than the unsupported contentions and conclusions of counsel. For example, petitioners now seek to invoke privileges purportedly conferred by California Government Code § 6254, yet nowhere did they show that the documents

2/ See, e.g., Rogers v. Tri-State Materials Corporation, 51 F.R.D. 234, 247 (N.D. W.Va. 1970); Advisory Committee's Note to 1970 Amendment to Rule 33(a), 48 F.R.D. at 523; 8 Wright & Miller, Federal Practice & Procedure (1970 ed.), at 542-43. Such a showing, the courts have often said, "must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel." Apco Oil Corp. v. Certified Transp., Inc., 46 F.R.D. 428, 432 (W.D. Mo. 1969). Thus courts "have insisted on a particular and specific demonstration of facts, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, supra, at 265. See also, Pleasant Hill Bank v. United States, 58 F.R.D. 97, 101 (W.D. Mo. 1973); Honeywell Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 120 (M.D. Pa. 1970).

involved "are not retained by the public agency in the ordinary course of business," or that "the public interest in withholding such records clearly outweighs the public interest in disclosure", or that the documents are "[r]ecords of complaints to or investigations conducted by" a state agency for correctional purposes. See, California Government Code § 6254 (a) and (f). And, so far as California Evidence Code § 1040 may be involved, petitioners made no attempt whatever to show that any particular document was "acquired in confidence by a public official in the course of his duty", or that "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." See, California Evidence Code §1040. Instead, there is simply a bald claim by the Attorney General

to the effect that the defendants are entitled to the benefits of privileges they have never properly asserted. Indeed, strict scrutiny of the affidavit filed by defendant Procunier in the District Court, which essentially presents his "opinions" about various matters, reveals not a single sentence in which he even refers to any asserted state or federal privilege, much less claims its benefits with respect to particular items for which a necessary showing is made.

More importantly, the state statutes relied on by petitioners to support their claim of privilege do not apply to judicial proceedings. For example, Section 6254 of the Government Code contains certain exceptions to the California Public Information Act. Section 6260 of the same code explicitly states that "the provisions of this chapter shall not be deemed in any manner... to affect the rights of litigants, including

parties to administrative proceedings, under the laws of discovery of this state." Recent decisions by California courts have rejected outright the notion that an absolute privilege attaches to the type of documents here in question. See, In re Prewitt, 8 Cal. 3d 470, 105 Cal. Rptr. 318 (1973); In re Olson, 37 Cal.App. 3d 783, 112 Cal. Rptr. 579 (1974); Terzian v. Superior Court, 10 Cal. App. 3d 286, 294, 88 Cal. Rptr. 806, 813 (1970).

C

The blanket privilege the petitioners informally sought from the District Court was based on state law and was thus not in any way binding on the District Court. The jurisdiction of the federal courts in this case is based on 28 U.S.C. § 1343 and on 42 U.S.C. § 1983. Because this is a "federal question" case - and not a "diversity" case - the District Court is not obligated to follow state rules of privilege concerning

evidence or discovery. The law on this issue is crystal clear: Moore states that "in cases arising under federal law it is abundantly clear that there is no constitutional inhibition to abrogation of state created privileges, either in connection with the admission of evidence or in connection with pre-trial discovery." 4 Moore's 26.60[7]. The term "privileged" in Rule 26(b)(1), Federal Rules of Civil Procedure, is defined by the use of that term in the Federal Rules of Evidence, 28 U.S.C. 4 Moore's 26.60[7]. The Conference Report of the Congress on the bill establishing the new Federal Rules of Evidence makes abundantly clear that under new Rule 501 privileges of state law are not binding on federal courts in federal question litigation:

> As Justice Jackson has said: "A federal court sitting in a nondiversity case . . . does not sit as a local tribunal. In

some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state." D'Oench, Buhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. Report of the Conference Committee, H.R. 5463, Cong. Rec., December 14, 1974, H 11930.

The authorities cited by the Conference Report, of course, are equally applicable to the decision of the District Court in this case,

even though the new rules are not yet in effect. See, for example, C. A. Wright, Federal Courts 251-252 (2d ed. 1970); Holmberg v. Armbrecht, 327 U.S. 393 (1946); DeSylva v. Ballentine, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedure, (1970 ed.) Sec. 2408; Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970); Carr v. Monroe Mfg. Co., 431 F.2d 384 (5th Cir. 1970).

Thus the decision whether or not to follow state rules of privilege was within the discretion of the District Court in the instant case.

D

The District Court was clearly correct in ordering the production of the documents sought by respondents. First of all, the blanket claim of privilege has been invoked by the defendant state officials who have been charged with proceeding in an unconstitutional manner, in order to keep relevant

documents and information hidden from plaintiffs and from the court. Secondly, the action is one brought under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 to redress the deprivation of federal constitutional rights; thus considerable public policy favors the respondents' efforts to have their claim decided on the merits. Thirdly, there is a significant public interest in ascertaining the truth in any litigation, which is, of course, the very basis for the extensive and liberal discovery rules found in the Federal Rules of Civil Procedure, Hickman v. Taylor, 329 U.S. 495, 507 (1947).

These considerations are particularly compelling in the case at bar, since it is a class action--brought on behalf of approximately 1500 California prisoners--attacking one of the most widely recognized and controversial issues in California prisons, namely the long-term isolation of prisoners not charged with disciplinary

offenses in so-called "administrative segregation." Moreover, the documents here sought are not only relevant but may well be crucial to the development of respondents' case. Against these strong public policies, petitioners have made no showing that the documents requested ought to be deemed privileged by the District Court. Instead, they have relied entirely on blanket and conclusory allegations and have refused to support these allegations in any manner whatsoever.

Clearly the District Court has not violated its discretion in ordering the production of documents in this case.

II

A SINGLE DISTRICT JUDGE, SITTING IN A FEDERAL QUESTION CASE HAS THE AUTHORITY TO ISSUE A DISCOVERY ORDER WHICH PETITIONERS CLAIM IS CONTRARY TO STATE DISCOVERY STATUTES

In their second argument petitioners argue that the failure of the District Court to follow state discovery law in effect enjoins

the enforcement of those laws. There are three main problems with this argument.

Firstly, as pointed out in Argument I above, the state statutes cited by petitioners do not provide any privilege for judicial proceedings. Thus, in this case, there is no conflict between state and federal law.

Secondly, even if there were a conflict, petitioners offer no support for their novel claim that a discovery order is equivalent to an injunction. If the logic of their argument were extended, the ruling of any court on a conflict-of-law issue would be an "injunction" of the law held not to apply. If this Court ever held that a three-judge court had to be convened in a federal question case to determine the validity of an asserted state-created privilege, the number of three-judge courts would become unmanageable overnight.

Thirdly, 28 U.S.C. § 2281 requires a three-judge court only when the operation or

enforcement of a state statutory or regulatory provision is enjoined as unconstitutional. Even if this Court were to agree with the novel proposal that a discovery order is equivalent to an injunction in this type of case, there is no hint anywhere in the proceedings before the District Court that the state disclosure statutes cited in petitioners' brief are challenged as unconstitutional.

III

A DISTRICT COURT SITTING IN A FEDERAL QUESTION CASE DOES NOT VIOLATE THE FOURTH AMENDMENT WHEN IT ISSUES AN ORDER COMPELLING DISCOVERY OF STATE DOCUMENTS ALLEGED TO BE PRIVILEGED UNDER STATE LAW BUT IMPORTANT TO THE DISPOSITION OF A PENDING ACTION

Petitioners' Fourth Amendment arguments are wholly without merit. The constitutionality of the discovery procedures of the Federal Rules of Civil Procedure has never been thought to run afoul of the Fourth Amendment. See 8 Wright & Miller, Federal Practice & Procedure, Sec. 2202

at 587-89, and authorities cited therein. The Fourth Amendment requires only that the disclosure sought shall not be unreasonable, United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); and the underlying discovery order of the District Court cannot be considered unreasonable under the circumstances of this case.

In the first place, petitioners continually attempt to characterize the documents in question as confidential and hence privileged. However, as pointed out above in Argument I, they have failed to formally claim any specific privilege or to make any showing justifying such privilege. Instead they have relied entirely on unsupported, general, and conclusory allegations of the "horrors" that will occur if the District Court's order is enforced. Surely, it cannot be considered unreasonable, under the circumstances of this case, to require that

an officer of the appropriate agency personally consider and pass upon the privilege to be invoked, or that he thereafter state with specificity the rationale of the claimed privilege.

Furthermore, there are many situations in which it is not unreasonable for a District Court -- before which a privilege has been asserted in response to a Rule 34 request for production -- to weigh the competing interests of confidentiality and disclosure and strike the balance in favor of disclosure. In fact, such decisions are made every day in the District Courts. The number of hearings held by the District Court in this case and the protective order limiting the access of respondents to the central files of plaintiff-inmates which the Magistrate recommended and the District Court issued are strong evidence of the attempt of the District Court to balance the interests of both sides. In this case,

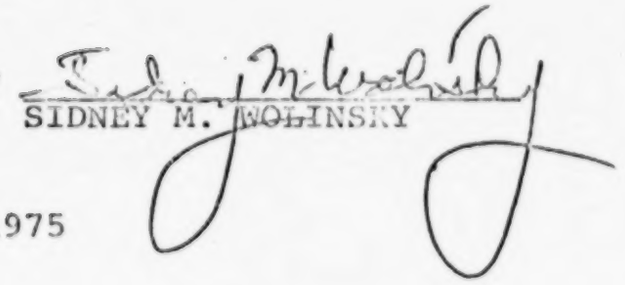
as we have seen, (1) petitioners made no attempt showing that the documents were confidential, or that petitioners would be injured by disclosure; (2) the documents sought are crucial to the respondents' case; and (3) the documents are those of a public agency, cf. United States v. Morton Salt Co., supra, 388 U.S. at 652, which keeps hundreds of prisoners in isolation units whose conditions are attacked in the underlying litigation as unconstitutional. Under these circumstances, it can hardly be considered "unreasonable" for the District Court to have struck the balance between confidentiality and disclosure in favor of the latter. Nor can it possibly be said that such a finding of reasonableness is an abuse of discretion or an usurpation of power such as to justify review by way of mandamus. See Will v. United States, 389 U.S. 90, 95-96, (1967); Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the instant petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By 
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DATED: June 25, 1975

EXHIBIT

A

CIV. NO. C-73-1422 SAW

AMENDED COMPLAINT

ORIGINAL FILED
December 27, 1973

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMIE GONZALO, JAMES C. WRIGHT, JERRY LEE PENA, ROBERTO PABLO SALIS, MICHAEL S. GUILE, LOUIS X. RICHARDSON, ROBERTO FRIAS, individually and on behalf of all others similarly situated, Plaintiffs, vs. RAYMOND K. PROCUNIER, Director of the Department of Corrections of the State of California; W. T. STONE, Superintendent of the California Training Facility at Soledad; JACOB GUNN, Warden of the California State Prison at Folsom; LOUIS S. NELSON, Warden of the California State Prison at San Quentin; and L. N. PATTERSON, Superintendent of the Deuel Vocational Institution, Defendants,	CIV. NO. C-73-1422 SAW AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs, as and for their amended complaint, allege as follows:

INTRODUCTION

This suit in behalf of a large class of inmates at four California state prisons comprises a constitutional challenge, under the due process and cruel and unusual punishment clauses, to (a) arbitrary procedures for confining inmates in so-called maximum-security segregated housing units (variously known as "the hole," "lock-up," "solitary confinement" and the "Adjustment Center") and (b) the unnecessarily brutal and inhuman conditions of such confinement.

I. JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343(4) and 2201. This is a suit authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights, privileges and immunities secured

by the Eighth and Fourteenth Amendments to the Constitution of the United States. This is also a proceeding for a declaratory judgment as to plaintiffs' rights to be free from such deprivation by defendants acting under color of state law.

II. PARTIES

2. Plaintiff JAMIE GONZALO is and since February 8, 1973, has been held in maximum-security segregated confinement in "B" Section at the California State Prison at San Quentin, and (since November 4, 1973) in "O" Wing at the California Training Facility, Soledad, California. Plaintiff GONZALO is a Mexican-American citizen of the United States.

3. Plaintiff JAMES C. WRIGHT is and since September 9, 1973, has been held in maximum-security segregated confinement in "O" Wing at the California

raining Facility, Soledad, California. Plaintiff WRIGHT is a black citizen of the United States.

4. Plaintiff JERRY LEE PENA is and since March, 1973, has been held in maximum-security segregated confinement in the Security Housing Unit at the California State Prison at Folsom. Plaintiff PENA is a Mexican-American citizen of the United States.

5. Plaintiff ROBERTO PABLO SALAS is and since January 16, 1973, has been held in maximum-security segregated confinement in the Security Housing Unit at the California State Prison at Folsom. Plaintiff SALAS is a Mexican-American citizen of the United States.

6. Plaintiff MICHAEL S. GUILE is and since September 28, 1973, has been held in maximum-security segregated confinement in "B" Section at the California State Prison at San Quentin.

Plaintiff GUILE is a white citizen of the United States.

7. Plaintiff LOUIS X. RICHARDSON is and since November 8, 1973, has been held in maximum-security segregated confinement in the North Segregation Unit (formerly "Death Row") at the California State Prison at San Quentin. Plaintiff RICHARDSON is a member of the Nation of Islam and a Black citizen of the United States.

8. Plaintiff ROBERTO FRIAS is and since September 7, 1973, has been held in maximum-security segregated confinement in "O" Wing at the Central Training Facility (Soledad), "B" Section and the North Segregation Unit (formerly "Death Row") at San Quentin State Prison, and, since August 15, 1973, in "K" Wing at the Deuel Vocational Institution, Tracy, California, where he is currently incarcerated. Plaintiff FRIAS is a

Mexican-American citizen of the United States.

9. Defendant RAYMOND K. PROCUNIER is Director of the Department of Corrections of the State of California. He is sued individually and in his capacity as Director of Corrections. As such Director, defendant PROCUNIER has general supervision of California prisons including the California Training Facility (Soledad), the California State Prison at Folsom, the California State Prison at San Quentin, and the Deuel Vocational Institution.

10. Defendant W. T. STONE is Superintendent of the California Training Facility (Soledad). He is sued individually and in his official capacity as Superintendent. Said defendant has general supervision and control of the California Training Facility (Soledad).

11. Defendant JACOB GUNN is

Warden of the Calfiornia State Prison at Folsom. He is sued individually and in his official capacity as Warden. Said defendant has beneral supervision and control of the State Prison at Folsom.

12. Defendant LOUIS S. NELSON is Warden of the California State Prison at San Quentin. He is sued individually and in his official capacity as Warden. Said defendant has general supervision and control of the State Prison at San Quentin.

13. Defendant L. N. PATTERSON is Superintendent of the Deuel Vocational Institution. He is sued individually and in his official capacity as Superintendent. Said defendant has general supervision and control of Deuel Vocational Institution.

III. CLASS ACTION

14. Plaintiffs bring this action on their own behalf, and, pursuant

to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other inmates in the custody of the California Department of Corrections who now are, or during the pendency of this action will be, confined for more than 30 days in segregated housing units in the California Training Facility (Soledad), the California State Prison at San Quentin, the California State Prison at Folsom, or the Deuel Vocational Institution. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims and defenses of plaintiffs are typical of the claims and defenses of the class; and plaintiffs will fairly and adequately protect the interests of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of (a)

inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties defendant herein; and (b) adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Finally, defendants herein have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and corresponding declarative relief with respect to the class as a whole.

IV. FACTS

15. Plaintiffs and members of the class they represent are for reasons unknown to them confined for indefinite duration in cells in so-called "maximum-

security segregated housing units" (variously known as "the hole," "lock-up," "solitary confinement" and the "Adjustment Center") at the Calfiornia Training Facility (Soledad), the California State Prison at San Quentin, the California State Prison at Folsom and the Deuel Vocational Institution. At the California Training Facility (Soledad), such units are located in "O" and "X" Wings; at San Quentin, such units are located in "B" Section, the North Segregation Unit (formerly "Death Row") and the "Adjustment Center"; and at the Deuel Vocational Institution such units are located in "K" Wing and in "L" Wing (otherwise known as the "Adjustment Center.")

16. Although there are some minor physical differences among the aforesaid segregated housing units, they are essentially the same. Plaintiffs and members of the plaintiff class are each

confined therein for up to 24 hours a day in a cell 5 feet by 9 feet, which contains a bed, a sink, a toilet, and a shelf for personal possessions. Such cells are usually inadequately heated, infested with vermin, and pervaded by the smell of urine. Plaintiffs and their class are denied the yard privileges afforded to inmates in the general prison population, are normally allowed out of their cells only once a week for a shower, and are occasionally permitted to walk up and down the corridor in front of their cells for one-half hour per day. Plaintiffs and their class are required to eat all their meals in their cells, in which they are also required to urinate and defecate. Most cells have no windows; the only actual light that reaches them is that from a heavily barred window that may be located across a seven-foot-wide corridor in front of the cell. Many such cells lack electrical

lighting altogether. Plaintiffs and members of their class are commonly denied reading materials, law books, legal materials and access to radio and television.

17. Plaintiffs and members of their class are allowed no contact whatsoever with the general prison population. They receive only limited or no medical attention for even serious afflictions. Their visiting privileges are extremely restricted if not denied altogether. Visits that are permitted are seriously obstructed by the inmate being shackled and kept behind heavily barred glass, through which it is difficult to speak. Plaintiffs and members of their class are not permitted to leave the housing unit for any purpose unless they are shackled and closely guarded. Plaintiffs and their class are afforded no rehabilitative or work programs, are denied engagement in educational activities of any sort, and

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are therefore essentially "warehoused."

18. The pattern and practice of arbitrary classification for lengthy and indefinite confinement in maximum-security segregated housing units, herein generally and specifically alleged, and the brutal and inhuman physical conditions, psychological conditioning and indefinite duration of such confinement, also generally and specifically alleged herein, has led and will continue to lead to the psychological destruction and dehumanization for lengthy and indefinite confinement in maximum-security segregated housing units, herein generally and specifically alleged, and the brutal and inhuman physical conditions, psychological conditioning and indefinite duration of such confinement, also generally and specifically alleged herein, has led and will continue to lead to the psychological destruction and dehumanization of named

plaintiffs and members of the class they represent, is the proximate and major cause of violence experienced in California State Prisons, and is not necessary to the achievement of any legitimate penal aim or other state purpose.

19. The grievous loss suffered by plaintiffs and their class from the arbitrary classification herein generally and specifically alleged includes, inter alia, (i) deprivation during the period of segregation of the opportunity to obtain fixed parole date from the Adult Authority or to maintain a parole date previously fixed; (ii) inclusion of unproven allegations purporting to justify segregation in one's permanent record, which will in the future diminish the possibility of securing early parole; and (ii)[sic] denial of the right to participate in rehabilitative programs during the period of segregation, which will also

in the future diminish the possibility of securing parole. Plaintiffs and their class are thus compelled without just cause to serve longer prison terms than other inmates of state prisons.

20. (a) On March 7, 1972, the California Department of Corrections, through its Director, defendant PROCUNIER, instituted rules governing disciplinary confinement in segregated housing units (Cal. Dept. of Corrections, Rules of the Director of Corrections, ch. IV, Art. 5, March 7, 1972 (hereinafter the "Director's Rules")[sic], a copy of which is annexed hereto as Exhibit A. On December 11, 1973, the Department, through defendant PROCUNIER, issued new rules, effective January 1, 1974, governing inmate discipline to supersede those instituted on March 7, 1972. A true and correct copy of said new rules is annexed hereto as Exhibit B. Said existing and new rules, inter alia, describe

certain procedural requirements relative to the disciplinary confinement of inmates in maximum-security segregated housing units. Pursuant to both the existing and new Director's Rules, an inmate may be ordered confined in a maximum-security segregated housing unit only by a Disciplinary Committee, whose action is predicated upon the preponderance of evidence adduced at a formal hearing at which the inmate may be present and may exercise certain minimal "rights"; such "rights" do not, however, meet the minimum requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(b) The Disciplinary Committee hereinabove described are distinct from Classification Committees. The latter do not conduct hearings with respect to whether an inmate should be confined in a segregated housing unit.

The purported function of the Classification Committee at each institution is to "assign a custodial classification to each inmate when he enters the institution." (Id. § D4204) (The four basic classifications are "Maximum," "Close," "Medium," which are defined in § D4203 of the Director's Rules.) Any relaxation of custody classification must be by formal action of the Classification Committee. Although Senior Custodial Officers on duty may temporarily tighten the custodial classification of a particular inmate where such action is deemed advisable to protect the security of the institution, only a Disciplinary Committee is authorized to raise an inmate's custodial classification and it alone conducts hearings for this purpose. Plaintiffs and all members of their class are assigned to and thereafter retained in maximum-security segregated confinement pursuant to

decisions of Classification Committees. Such Committees, which hold "meetings" rather than hearings, are not required to and do not provide even the minimal procedural standards accorded by Disciplinary Committees.

21. In each of the four state prisons involved in this action, defendants and their agents have not enforced and have completely disregarded and violated the applicable Director's Rules governing inmate discipline; that is, in connection with the initial maximum-security segregated confinement hereinafter more specifically described with respect to each named plaintiff, plaintiffs have never been accorded or received the minimum administrative and constitutional protections to which they are lawfully entitled, including, but not limited to (i) a CDC Form 115 Rules Violation Report or any other specific

written notice of the reasons for such confinement, (ii) a hearing before an impartial decision-maker; (iii) the right to present evidence, including witnesses, in his behalf; (iv) the right of confrontation and cross-examination of his accusers; (v) the choice of representation by counsel or counsel-substitute; or (vi) a written decision based upon substantial evidence including reference to the evidence relied upon and the reasons for the aforesaid confinement.

22. In each of the four state prisons involved in this action, defendants or their agents have evaded their own regulations and the requirements of due process of law by relying upon "classifications" peremptorily assigned by Classification Committees, acting without even the pretense of due process of law, to "justify" the placement and retention of plaintiffs and members of the plaintiff

class in maximum-security segregated housing units for lengthy and indefinite periods of time. Said Classification Committees operate in an arbitrary and capricious manner, without prescribed standards and procedures, and without reference to a schedule of prescribed terms for particular offenses. Defendants and their agents have thus employed Classification Committees to engage in a widespread pattern and practice of punishing plaintiffs and their class randomly and without cause.

23. Said illegal and unconstitutional pattern and practice of arbitrary punishment has been implemented, inter alia [sic], pursuant to a written directive or directives from defendant PROCUNIER to defendants STONE, GUNN, NELSON and PATTERSON ordering that certain inmates suspected of membership in allegedly subversive Mexican-American

organizations and believed to have "leadership qualities" have been placed on so-called "Director's Designation" and for that reason are to be classified for lengthy and indefinite confinement in maximum-security segregated housing units in the subject state prisons. Defendant PROCUNIER has publicly acknowledged this policy of indefinitely confining inmates under "Director's Designation" in maximum-security segregated housing units, and that under said policy unsubstantiated "hunch" alone can justify indefinite confinement in a maximum-security segregated housing unit hereinabove described.

A. Plaintiff GONZALO.

24. Plaintiff GONZALO hereby refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

25. On February 8, 1973, plaintiff GONAZLO was visited in his cell

at San Quentin by correctional officers who informed him that he had been ordered moved from normal confinement with the general prison population to maximum-security segregated confinement at "B"-Section at the same institution. Upon inquiry, plaintiff GONZALO was informally told that he was being placed in maximum-security confinement due to his "associations" with other Mexican-American inmates and because of his political beliefs and convictions.

26. On November 4, 1973, and without prior notice, plaintiff GONZALO was transferred from "B"-Section at San Quentin directly to "O"-Wing at the Central Training Facility (Soledad) where he is still confined. As in the case of his maximum-security segregated confinement at San Quentin, said plaintiff has never been presented with the alleged facts justifying such confinement nor

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given the opportunity to rebut any such charges at a hearing.

27. Plaintiff GONZALO is informed and believes and thereupon alleges that he is being held in maximum-security segregated confinement pursuant to so-called "Director's Designation" as hereinabove described in Paragraph 23.

28. As a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, plaintiff GONZALO has lost the opportunity to obtain a fixed parole date from the California Adult Authority.

B. Plaintiff WRIGHT.

29. Plaintiff WRIGHT hereby refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

30. On or about September 4, 1973, inmate Westley Hines was found dead

in his cell at the Central Training Facility (Soledad). Two days thereafter plaintiff WRIGHT was removed from his cell in the general prison population and placed in maximum-security segregated confinement in "O"-Wing, where he is still confined, without any explanation as to the reasons for such confinement. One week later, on September 16, 1973, plaintiff WRIGHT was taken before a Classification Committee and for the first time informed that prison authorities allegedly had received written information implicating said plaintiff with the death of inmate Hines. Said written information or the substance thereof has never been disclosed to plaintiff WRIGHT,but members of a Classification Committee advised him of their belief that though he may not have been responsible or directly involved, he had information about the death of inmate Hines. When plaintiff WRIGHT stated that

he had absolutely no involvement in or knowledge of this incident he was requested to submit to a lie detector test. Plaintiff WRIGHT agreed to such test on the condition that an attorney be present. Members of the Classification Committee refused to permit an attorney to be present during such test and solely for that reason plaintiff WRIGHT refused to take a lie detector test.

31. Plaintiff WRIGHT is informed and believes and thereupon alleges that, as a result of his refusal to take a lie detector test in the absence of counsel, he will indefinitely remain in maximum-security segregated confinement.

32. At no time has plaintiff WRIGHT been formally charged with responsibility for or complicity in the death of inmate Hines; and he has no knowledge of the events that led to said death. Nor has said plaintiff ever been charged with

any crime while incarcerated in state prison.

33. As a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, plaintiff WRIGHT has lost the opportunity to obtain a fixed parole date from the California Adult Authority.

C. Plaintiff PENA.

34. Plaintiff PENA hereby refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

35. On or about March 15, 1973, plaintiff PENA was moved from the general prison population at Folsom Prison to maximum-security segregated confinement in the Security Housing Unit at said institution, where he is still confined. Correctional officers advised said plaintiff that he was being held in such confinement

due to an alleged note from another inmate advising prison authorities that plaintiff PENA planned to attack him. At no time was said note shown to plaintiff PENA, nor were the specific contents thereof or the name of its author ever disclosed to him.

36. In July, 1973, a Classification Committee advised palintiff PENA that he had been "designated" by defendant PROCUNIER to be held indefinitely in maximum security segregated confinement due to the "belief" of defendant PROCUNIER that plaintiff PENA was "associated" with a subversive Mexican-American organization and believed to have "leadership qualities." At such time plaintiff PENA was orally informed by the Classification Committee that since he was under so-called "Director's Designation," as described in Paragraph 23 hereof, he would be retained in maximum-security segregated confinement indefinitely irrespective of the accuracy

of the note to prison authorities alleging said plaintiff's intention to attack another unnamed inmate.

37. As a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, plaintiff PENA has lost the opportunity to obtain a fixed parole date from the California Adult Authority.

D. Plaintiff SALAS [sic]

38. Plaintiff SALAS hereby refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

39. On January 16, 1973, plaintiff SALAS was taken from his cell in the general prison population at Folsom State Prison and placed in isolation in the Security Housing Unit at said institution pending further investigation of a charge that said plaintiff was in

possession of a contraband file. On January 18, 1973, said plaintiff was taken before the Disciplinary Committee at said prison for hearing of this charge. At said hearing plaintiff SALAS denied any knowledge of the subject contraband and denied either actual or constructive control of the file. Eleven days later, on January 30, 1973, plaintiff SALAS was taken before a Classification Committee and was advised by R. C. Thomas, acting chairman of the Committee, that an inmate Garcia had accepted full responsibility for the contraband. Accordingly, the chairman of the Classification Committee informed plaintiff SALAS that he was fully exonerated and that no disciplinary measures would be taken against him in connection with the charge of possessing contraband. However, other members of the Classification Committee (Mr. Thomas, Captain Campoy, Lt. Ford and Mr. Bartells), constituting a

majority thereof, informed plaintiff SALAS that it was nevertheless "the desire of the committee" to retain him in maximum-security segregated confinement in the Security Housing Unit because he was considered "an influential member of the Maxican [sic] prison community" and was believed to have "leadership qualities." Presumably for this reason, plaintiff SALAS was returned to maximum-security segregated confinement in the Security Housing Unit.

40. On March 13, 1973, plaintiff SALAS was taken before the Adjustment Center Review Committee for review of his retention in segregated confinement. Mr. B. D. Jones, a member of said Committee, stated to plaintiff SALAS: "We see from your central file that you had eight months clean time prior to being retained and you had no disciplinary beef when you were retained." The Committee further

noted that plaintiff had received excellent grades from his job assignment supervisor while a member of the general prison population. The Review Committee thereupon referred plaintiff SALAS' file back to the Classification Committee with the specific recommendation that said plaintiff be returned to the general prison population.

41. On March 22, 1973, the Classification Committee refused to release plaintiff SALAS from the Security Housing Unit, where he is still confined, for the orally stated reason that he was an influential member of the Mexican-American prison community.

42. Plaintiff SALAS is informed and believes and therefore alleges that he is being held in maximum-security segregated confinement, pursuant to so-called "Director's Designation," as hereinabove described in Paragraph 23.

43. As a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, plaintiff SALAS has lost the opportunity to obtain a fixed parole date from the California Adult Authority.

E. Plaintiff GUILE [sic]

44. Plaintiff GUILE hereby refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

45. On September 28, 1973, plaintiff GUILE was taken from his cell in the general prison population at San Quentin and transferred to maximum-security segregated confinement in "B"-Section at said institution. Said plaintiff remained in "B"-Section until October 2, 1973, without being given any explanation of the reasons for his segregation.

46. On October 3, 1973,

plaintiff GUILE was taken before a Classification Committee, at which meeting defendant NELSON was present. He was told by the Committee that an unnamed informer had stated that he planned to smuggle a gun into the institution. After extensive discussion of plaintiff GUILE's alleged political views, he was asked why he had corresponded with the United Prisoners Union and Venceremos and why he had testified on behalf of the defense at the criminal trial of Benton Burt and Andrea Holman Burt. A member of the Committee stated to plaintiff GUILE that he must not want to get out of prison or he would not be writing to those organizations or assisting in a criminal defense. Defendant NELSON stated to said plaintiff that he must like being a "political prisoner." Plaintiff GUILE was thereupon returned to "B"-Section where he is still confined.

47. The physical conditions of

his confinement have seriously affected plaintiff GUILE's diabetic condition. During the course of such confinement, his eyes have become runny, he has lost feeling in both legs and he feels generally ill and weak. His requests to see a physician, in particular a Dr. Hoffman who is a diabetic specialist, have been ignored and he has not been able to see said specialist or any other physician who could provide adequate medical attention. Despite his repeated requests and those of his attorney, plaintiff GUILE has not been taken to the San Quentin Hospital or its special diabetic clinic, and his physical condition has deteriorated and continues to seriously deteriorate.

48. As a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, plaintiff GUILE has lost the opportunity to obtain a fixed

parole date from the California Adult Authority.

F. Plaintiff RICHARDSON [sic]

49. Plaintiff RICHARDSON hereby refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

50. Plaintiff Richardson is the Acting Minister of the San Quentin Mosque of the Nation of Islam, a religious organization that operates openly in California State Prisons with the knowledge of State prison officials.

51. On November 9, 1973, plaintiff RICHARDSON and 13 other high-ranking inmate members of the Nation of Islam were taken from their cells in the general prison population of San Quentin (plaintiff RICHARDSON has been in an honor unit) and transferred to maximum-security segregated confinement either in the North Segregation Unit (formerly "Death Row"),

where plaintiff RICHARDSON was placed, "B" -Section, or in the Adjustment Center at the same institution. Plaintiff RICHARDSON was given no explanation of the reasons for his confinement in the North Segregation Unit until November 14.

52. On November 14, 1973, plaintiff RICHARDSON was taken to a meeting of a Classification Committee and was there questioned about an alleged attack by inmate Robert X. Bradford upon another inmate. Plaintiff RICHARDSON replied that he had no knowledge of this matter beyond the fact that it had occurred and was apparently the result of a personal disagreement between the two inmates involved. Plaintiff RICHARDSON stated to the Committee that leadership of the Nation of Islam never precipitated violence and had no advance knowledge of or other involvement of any kind in the aforesaid altercation. Upon being asked by a member

of the Committee, "What's happening these days with the Brotherhood (i.e., the Nation of Islam)"?, [sic] plaintiff RICHARDSON responded by asking that the question be made more explicit. A member of the Committee replied, "You know what we mean." When plaintiff RICHARDSON denied that he knew what the questioner meant he was told, "That's why you are locked up." Plaintiff RICHARDSON was thereupon returned to the North Segregation Unit, where he is still confined.

53. Plaintiff RICHARDSON is informed and believes and thereupon alleges that as a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, he has lost a parole date previously fixed by the California Adult Authority.

G. Plaintiff FRIAS [sic]

54. Plaintiff FRIAS hereby

refers to and incorporates each and every allegation hereinabove set forth in Paragraphs 15 through 23.

55. On September 7, 1972, plaintiff FRIAS was moved from his cell in the general prison population at the Central Training Facility (Soledad) to maximum-security segregated confinement in "O"-Wing at the same institution. No reason for such segregated confinement was ever given said plaintiff other than undefined oral allegations respecting his alleged "associations" with other Mexican-American inmates. Thereafter, plaintiff was transferred from "O"-Wing to maximum-security segregated confinement in "B"-Section at San Quentin State Prison, and subsequently to identical confinement in the North Segregation Unit (formerly "Death Row") at the same institution.

56. On August 15, 1973, and without prior notice, plaintiff FRIAS was

transferred to the Deuel Vocational Institution where he was immediately placed in maximum-security segregated confinement in "K"-Wing, where he currently remains incarcerated.

57. During the second week in October, 1973, plaintiff FRIAS repeatedly requested medical attention for the flu. Notwithstanding such requests and the manifest seriousness of his ailment, his requests were ignored. On October 12, 1973, plaintiff refused to give up his food tray and bowl until and unless a correctional officer agreed to take him to the prison hospital. Correctional Officer D. R. Schmidt advised plaintiff FRIAS that he would receive a CDC 115 Rules Violation Report if he did not give up his tray and bowl. Plaintiff replied that he did not care and that he only wanted to see a physician. Plaintiff FRIAS was thereupon taken to the prison

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hospital where he was treated for the flu and, on October 13, 1973, received a CDC 115 Rules Violation Report for refusal to give up his food tray and bowl. As a result of this Report plaintiff FRIAS was, on October 14, 1973, found guilty of a rule violation by the Disciplinary Committee and disciplined by loss of exercise and transfer to a "quiet cell" for three days.

58. Plaintiff FRIAS is informed and believes and thereupon alleges that he is being held in maximum-security segregated confinement pursuant to so-called "Director's Designation" as hereinabove described in Paragraph 23.

59. As a result of the maximum-security segregated confinement hereinabove described, which is wholly without factual justification, plaintiff FRIAS has lost the opportunity to obtain a fixed parole date from the California Adult

Authority.

V. FIRST CAUSE OF ACTION

60. The arbitrary classification of plaintiffs and members of the class they represent for lengthy and indefinite confinement in maximum-security segregated housing units, the brutal physical and psychological conditions of such confinement, and the negative effect of such confinement on the possibility of securing parole, all imposed without good and valid cause, without prescribed standards and procedures respecting placement in and release from such confinement, and without a schedule of prescribed terms for particular offenses, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VI. SECOND CAUSE OF ACTION

61. The confinement of plaintiffs and members of the class they

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represent in maximum-security segregated housing units at the California Training Facility (Soledad), the California State Prison at San Quentin, the California State Prison at Folsom, and the Deuel Vocational Institution constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States in respect to: (a) the totality of the physical and psychological conditions of the segregated housing units at said prisons in which plaintiffs and members of the class they represent are confined; (b) the lengthy and indefinite duration of such confinement; and (c) the fact that the punishment thus imposed, including its negative effect on parole proceedings before the California Adult Authority, is excessively disproportionate to the conduct ostensibly sought to be rectified and goes beyond what is necessary to achieve any legitimate penal aim.

VII. EQUITY

62. Plaintiffs and members of the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and an injunction is their only means of securing adequate relief. Plaintiffs and members of the plaintiff class are now suffering and will continue to suffer irreparable injury from defendants' policies and practices as set forth herein.

VIII. RELIEF

63. WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment granting plaintiffs:

(a) a [sic] declaratory judgment that:

(i) defendants' acts, policies and practices, respecting summary placement of inmates for

indefinite duration in maximum-security segregated confinement, the absence of procedures and standards governing placement in and release from such confinement, and the absence of prescribed terms of segregated confinement for particular offenses, as complained of herein, violate plaintiffs' rights and the rights of members of the plaintiff class secured by the due process clause of the Fourteenth Amendment and

(ii) the physical conditions of segregated housing units at the California Training

Facility (Soledad), the California State Prison at Folsom, the California State Prison at San Quentin, and the Deuel Vocational Institution, in which plaintiffs and members of the plaintiff class are confined, the lengthy and indefinite duration of such confinement, the adverse psychological impact of such confinement, and the disproportion between the punishment thus imposed and the conduct sought to be rectified, as complained of herein, are not necessary to the achievement of any legitimate penal aim and

constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States.

(b) A preliminary and permanent injunction setting aside the punitive confinement of all named plaintiffs and members of the class they represent complained of herein, expunging such action from defendants' records, restraining defendants and their agents from reporting such actions to the California Adult Authority and reinstituting normal prison privileges to plaintiffs and members of plaintiffs' class.

(c) A preliminary and permanent injunction enjoining defendants

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and their agents from hereafter classifying or re-classifying plaintiffs and members of the class they represent for confinement in maximum-security segregated houring [sic] units for more than 30 days until and unless defendants or their agents first promulgate prescribed terms of segregated confinement for particular offenses and thereafter provide, at a minimum, the following:

(i) a CDC Form 115 Rules Violation Report or other written notice of the reasons for the proposed discipline or re-classification;

(ii) a hearing before an impartial decision-maker;

(iii) the right to

present evidence, including witnesses, in his behalf;

(iv) the right of confrontation and cross-examination of his accusers;

(v) the choice of representation by counsel or counsel-substitute; and

(vi) a written decision based upon substantial evidence including reference to the evidence relied upon and the reasons for such confinement.

(d) A preliminary and permanent injunction enjoining defendants and their agents from hereafter confining state prison inmates in maximum-security segregated

housing units for more than 30 days until and unless defendants, in timely manner, take all reasonable action necessary to make such units and the treatment accorded therein physically and psychologically compatible with the humane confinement and treatment of human beings, and requiring the adverse parties each 30 days to submit for court approval plans and schedules deemed necessary and appropriate to implement such relief;

(e) Plaintiffs' costs of this suit, including reasonable attorneys' fees; and

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(f) Such other and further relief as the Court may deem just and proper.

DATED: December 27, 1973.

Respectfully submitted,

J. ANTHONY KLINE
SIDNEY M. WOLINSKY
CHARLES R. LAWRENCE, III
FRED J. HIESTAND
VILMA S. MARTINEZ
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By: /s/ J. ANTHONY KLINE
J. ANTHONY KLINE

Attorneys for Plaintiffs

EXHIBIT

B

No. C-73-1422 SAW

OPPOSITION TO MOTION

ORIGINAL FILED
June 20, 1975

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Attorneys for Defendants,

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES C. WRIGHT, et. al., [sic]

Plaintiffs,

vs.

J. J. ENOMOTO, et. al.,

Defendants.

No. C-73-1422 SAW

OPPOSITION TO MOTION FOR RATIFICATION OF PRIOR ORDERS AND FOR RULINGS ON PRIOR MOTIONS

PRELIMINARY STATEMENT

On August 15, 1973, a complaint for declaratory and injunctive relief was filed in the United States District Court for the Northern District of California. The six named plaintiffs alleged that the action was authorized by 42 U.S.C. section [sic] 1983. An amended complaint was filed on December 27, 1973. The amended complaint, which purported to represent named plaintiffs in a civil rights class action, asserted, (1) that the classification procedures utilized by the plaintiff with respect to maximum security housing violated plaintiffs' rights to due process, and (2) that confinement in maximum security housing at San Quentin State Prison, Folsom State Prison, the Correctional Institution at Soledad, and Deuel Vocational Institution was in violation of the Eighth Amendment poscription [sic] against cruel and unusual punishment. Defendants filed a

notice of motion and motion to dismiss the amended complaint on February 7, 1974. On March 18, 1974, the court denied defendants' motion to dismiss.

On March 20, 1974, the plaintiffs filed a request for production of documents. Plaintiffs sought for alleged discovery purposes the right to inspect and copy virtually every document in the custody of the Department of Corrections and the four named State institutions without regard to whether the documents had any relation to the lawsuit. Included were requests to inspect and copy all logs maintained in the segregated housing unit, all incident reports or papers of any other type describing violent incidents, suicide attempts, nervous breakdowns, etc., all coroner's reports at the subject prisons from January 1, 1970, to the date of the request, all medical and psychiatric reports during 1972, 1973 and 1974 on inmates who,

on the date of said report, were confined in a segregated housing unit in one of the subject prisons, and all files, papers, however denominated, maintained by the California Department of Corrections or any subdivision or official thereof in the Sacramento office or at any C.D.C. institution, including, without limitations, the inmate's central file, etc.

On April 19, 1974, the defendants filed a response to the request for production of the countless thousands of documents comprehended by plaintiffs' request, advising the court that many of the documents requested by plaintiffs were qualifiedly privileged under both California and Federal law. On May 13, 1974, at a hearing on plaintiffs' motion, evidence in support of defendants' argument against indiscriminate disclosure was presented to the District Court. This evidence included confidential affidavits of inmates who had

been formerly affiliated with outlaw inmate gangs. These inmates averred that they feared for their lives if the plaintiffs were granted blanket access to all the documents sought in their request for production. This fear was based upon the belief that if plaintiffs were allowed to discover documents which revealed information concerning rival prison gangs, the plaintiffs would know the names of members or rival prison gangs, their location in each institution and other information which could be used by the gangs in their struggle with other gangs, including the names and addresses of families of rival gang members. The District Court, which had previously been advised of the fact that plaintiffs were members of rival prison gangs, refused to consider defendants offer of proof and characterized that offer as an aberration.

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The District Court then referred the motion for discovery to a magistrate who recommended on May 28, 1974, that plaintiffs' motion or production of documents be granted in its entirety. The magistrate in his order brushed aside defendants concern over prison violence and terriorist groups within the institutions stating that, "while all this may be true, the magistrate finds that such facts are totally ancillary to the issues before the court in these discovery proceedings . . ."

On June 6, 1974, the defendants filed a request for review of the magistrate's findings and recommendations. In this request, the defendants, again imploring the District Court to conduct an in-camera hearing prior to ordering indiscriminate disclosure of confidential documents where petitioners had asserted a qualified privilege of non-disclosure,

presented the affidavit of Raymond K. Procunier, Director of the California Department of Corrections, which established beyond any doubt that the release of the confidential information sought by plaintiffs would cause a danger to persons, would dangerously impair the ability of the California Department of Corrections to end the power, control, violence, threats, illegal activities and influence of illicit inmate gangs, and would greatly restrict the ability of the California Department of Corrections to program for greater rehabilitation of inmates. Once again, defendants request for an in-camera hearing was summarily rejected. Subsequently, the District Court rejected further arguments by plaintiffs contained in supplemental requests for review of the magistrate's finding and recommendations and on August 2, 1974, adopted the magistrate's recommendation and ordered blanket

production for inspection of all of the documents sought by the plaintiffs, including the central files of 1195 inmates, without any in-camera hearing whatsoever.

Throughout the proceedings in the District Court, defendants argued that the Court as a single judge District Court had neither jurisdiction to hear the case nor the jurisdiction to enter discovery orders which were contrary to State statutes and compelled State officials to act contrary to State statutes.

On August 12, 1974, defendants filed a notice of appeal pursuant to Federal Rules of Appellate Procedure, Rule 4 (a), citing United States vs. Nixon, 418 U.S. 683 (1974). At the same time defendants filed a petition for a writ of mandate and/or prohibition and a motion for stay. On November 18, 1974, the Court of Appeals denied the petition without hearing. The stay which had previously

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been granted was vacated. A petition for rehearing, suggestion for rehearing en banc and stay was then filed in the Court of Appeals. On March 3, 1975, the Court of Appeals denied the petition for rehearing, rejected the suggestion for a rehearing en banc and denied the motion for stay, citing the case of Kerr v. United States District Court, 511 Fed.2d 192 (1975) certiorari granted May 27, 1975, No. 74-1023.

On March 7, 1975, defendants filed with the Supreme Court of the United States an emergency application for stay of order. On March 11, 1975, the Supreme Court of the United States in the case of J. J. Enomoto, et al v. United States District Court for the Northern District of California, No. A-732, ordered that the order entered on August 2, 1974, by the United States District Court for the Northern District of California in the

case of James C. Wright, et. al. v. Raymond K. Procunier, et. al. Civil No. C-73-1422 SAW, be stayed insofar as it requires disclosure of each "complete inmate's central file" pending a timely filing of petition for writ of certiorari in the above-entitled cause (see Exhibit A).

On May 29, 1975, the petition for writ of certiorari in the case of Enomoto v. United States District Court was docketed as No. 74-1499. A copy of the petition for writ of certiorari is attached hereto as Exhibit B.

ARGUMENT

I

THIS COURT HAS NO JURISDICTION TO RATIFY THE DISCOVERY ORDER ENTERED ON AUGUST 2, 1974, BY THE UNITED STATES DISTRICT COURT SINCE THAT DISCOVERY ORDER HAS NOW BEEN STAYED BY THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF ENOMOTO v. UNITED STATES DISTRICT COURT NO. 74-1499

In their motion for ratification

of prior orders, the plaintiffs ask this three judge district court to ratify Judge Weigel's discovery order entered on August 2, 1974. Since this discovery order has now been stayed by the Supreme Court of the United States pending that Court's decision on defendants' petition for a writ of certiorari, this court has no jurisdiction to ratify said discovery order. In, Schempp v. School District of Abington PA.,[sic] 184 Fed.Supp. 381 (E.D. Penn. 1959),

The Court held in pertinent part:

> "When an appeal has been taken to a higher court, as prescribed by law, ordinarily the jurisdiction of the lower court is ousted by that of the higher tribunal." Id. at 383.

Also, Cf. Haymes v. Landon, 115 Fed.Supp. 506, 507-509 (S.D.Cal. 1954).

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II

THE REQUEST BY PLAINTIFFS THAT THIS COURT RATIFY PRIOR ORDERS OF A SINGLE JUDGE DISTRICT COURT WITH RESPECT TO PLAINTIFFS MOTIONS FOR A PRELIMINARY INJUNCTION AND PARTIAL SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE ORDERS DO NOT EXIST AND BECAUSE THE SINGLE JUDGE DISTRICT COURT DID NOT HAVE JURISDICTION TO HEAR THE MOTIONS UNDER THE PROVISIONS OF TITLE 28, SECTION 2284 (5)

Throughout the proceedings in the District Court, defendants argued that the court as a single judge district court had neither jurisdiction to hear the case nor the jurisdiction to enter any discovery orders which were contrary to State statutes and compelled State officials to act contrary to these State statutes. When plaintiffs filed their motions for preliminary injunction and partial summary judgment, defendants vigorously asserted that a single judge district court was without jurisdiction to entertain these motions. The hearing on plaintiffs motions

for preliminary injunction and partial summary judgment went forward over defendants objection and the matters were submitted again over defendants' objections. Although the hearing on these motions was held on October 18, 1974, no decision on these motions were ever entered. Obviously, sometime between October 18, 1974, and March 15, 1975, the date the Chief Judge of the Court of Appeals impaneled a three judge district court, the single judge district court recognized that it had no jurisdiction and could not issue any orders in this case particularly those having to do with motions for preliminary injunctions and partial summary judgments.

Title 28, section [sic] 2284 (5) is conclusive in this respect:

> "A single judge shall not appoint a master or order a reference or hear and determine any application for an interlocutory injunction or

> motion to vacate the same, dismiss the action, or enter a summary or final judgment."

III

THE MOTIONS SHOULD BE DENIED SINCE THEY DO NOT COMPLY WITH UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA LOCAL RULES OF PRACTICE 114 AND 115

Local Rules of Practice 114 provides:

> "(b) Notice. Except as otherwise ordered or allowed by the Court, all motions, except those made in the course of a hearing or trial, shall be noticed on the motion calendar of the assigned judge for hearing not less than 21 days after service of notice. Notices of motion shall be promptly filed, with proof of service."

Subsection (d) provides in part: "Motions, . . . shall be in writing,

. . . and contain specific reference to each decision , . . . or a portion of the record upon which the motion or opposition is based, wholly or in part. . ."

Rule 115 provides:

"(a) Use of affidavits. Factual contentions involved in any pre-trial or post-trial motion shall be initially presented and heard upon affidavits . . .

(c) Form and Content. Affidavits shall contain only factual, evidentiary matter, . . . and shall avoid mere conclusions or argument . . . "

The motions now before this Court fail entirely to comply with Local Rules 114 and 115. Relying apparently upon the advice of "Mr. Thompson", plaintiffs failed to have these motions noticed on the motion calendar. Furthermore,

rule [sic] 114 (d) provides that the motion must contain the name of the party on whose behalf it is presented. The record in this case shows that the attorney of record for the plaintiffs is J. Anthony Klein [sic] and Sidney M. Wolinski [sic] of Public Advocates, Inc. Although Bernard Zimmerman and Kirke M. Hasson may be associated with the lead plaintiffs, defendants submit that they may not make unilateral motions of this type without the express consent of this Court. Defendants hasten to point out to the Court that proof of service was not even made upon the lead attorneys for plaintiffs in this case. If defendants are forced to answer and oppose every motion of this type made by attorneys who are not the lead attorneys for plaintiffs it would be a violation of defendants' right to due process and equal protection of the laws.

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Rule 115 as demonstrated hereinabove provides that motions shall be initially presented and heard upon affidavits. Since no affidavits were submitted in support of plaintiffs' motions the motions should be denied summarily.

There are numerous other compelling reasons why the prior orders of the single district court judge should not be ratified nor should any of the prior proceedings be considered by this three judge court without a de novo hearing. These arguments are fully set forth in defendants' petition for writ of certiorari attached hereto as Exhibit B and are hereby incorporated by reference.

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CONCLUSION

Based upon the foregoing and Exhibits attached hereto, defendants submit that the motions made by plaintiffs should be denied.

DATED: June 20, 1975 [sic]

EVELLE J. YOUNGER, Attorney General of the State of California

JACK R. WINKLER, Chief Assistant Attorney General - Criminal Div.

EDWARD P. O'BRIEN
Assistant Attorney General

ROBERT R. GRANUCCI
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/s/ JEROME C. UTZ
JEROME C. UTZ
Deputy Attorney General

/s/ MICHAEL BUZZELL
MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Defendants.

JCU:ajm
SF CR

IN THE

SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF SERVICE

I, SIDNEY M. WOLINSKY, attorney for respondents herein, hereby certify that, on the 25th day of June, 1975, I caused copies of this Brief in Opposition to Petition for Writ of Certiorari, with Exhibits A and B attached, to be served on all the parties required to be served by mailing three (3) copies in a duly addressed envelope, with first class postage prepaid, to MICHAEL BUZZELL, Deputy Attorney General of the State of California and attorney for petitioners herein, 6000 State Building, San Francisco, California 94102.

DATED: July 14, 1975.

SIDNEY M. WOLINSKY
Attorney for Respondents
433 Turk Street
San Francisco, CA 94102